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WM. R. STANSBURY
CLERK

Supreme Court of the United States.

October Term, 1921.

No. 21 Original.

In the Matter

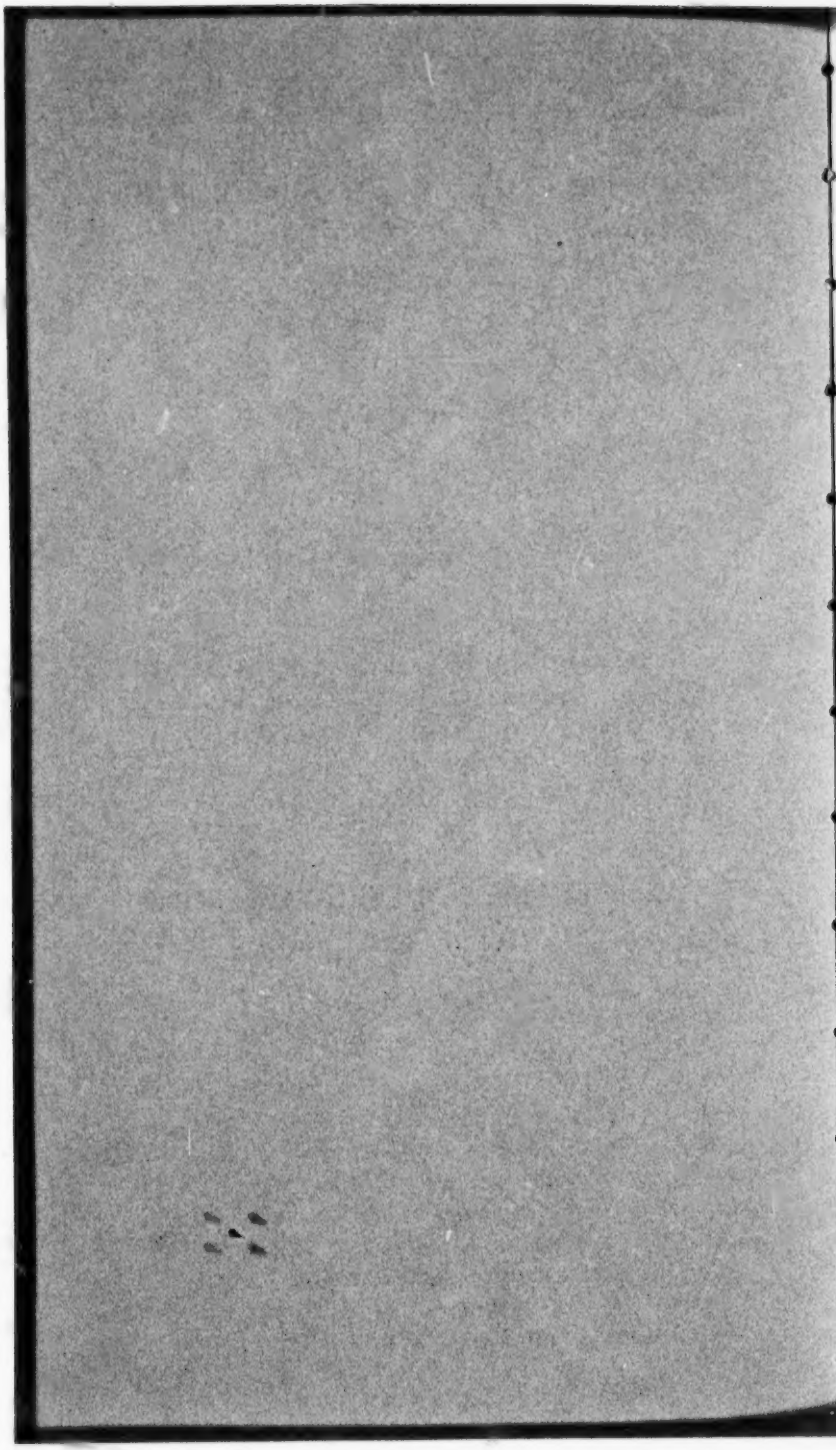
of

UNITED STATES OF AMERICA, Owner of the Steamship "Western Maid," for a Writ of Prohibition and/or Mandamus, Petitioner,

—against—

HONORABLE J. WHITAKER THOMPSON, Judge of the District Court of the United States for the Eastern District of Pennsylvania, and the other judges and officers of said Court.

AMENDED AND SUPPLEMENTAL RETURN.



IN THE

Supreme Court of the United States.

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In the Matter of

UNITED STATES OF AMERICA, OWNER OF THE STEAMSHIP "WESTERN MAID," FOR A WRIT OF PROHIBITION AND/OR MANDAMUS, PETITIONER,

against

HONORABLE J. WHITAKER THOMSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT.

AMENDED AND SUPPLEMENTAL RETURN.

I, J. WHITAKER THOMPSON, Judge of the District Court of the United States for the Eastern District of Pennsylvania, as amending and supplementing the return heretofore filed by me in the above entitled cause, under my hand and the seal of the said Court, on the seventh day of October, 1921, do hereby appear, certify and make further return as follows:

At the hearing, upon the Suggestion of Want of Jurisdiction filed on behalf of the United States of America, there was presented to the Court a copy of a Bill of Lading covering certain cargo shipped on board the steamship called the "WESTERN MAID," which Bill

of Lading was dated the thirteenth day of January, 1919, and there was also presented to the Court thirteen photostatic copies of the manifest sheets of the steamship "WESTERN MAID," covering the cargo shipped on the said steamship on the voyage during which the collision with the steamship "BRITISH ISLES" occurred, and upon which the libel filed in this cause is based.

A copy of the said Bill of Lading is attached hereto, made part hereof, and marked Exhibit "A," and photostatic copies of Sheet No. 1 of the said thirteen manifest sheets and the final sheet of the said manifest sheets are attached hereto, made part hereof, and marked respectively Exhibits "B" and "C." Manifest sheets numbered 2 to 12, inclusive, being of the same form and tenor as those attached, are omitted from the record by consent of the parties.

The said copy of the Bill of Lading and the said manifest sheets constituted a part of the record before this Court, at the time of hearing and decision in this matter, and were omitted from the record attached to the petition for writ of prohibition heretofore filed herein, the said papers then not being lodged with the Clerk of the Court.

And having further answered on behalf of myself, the other judges and officers of said Court, I respectfully submit that said rule should be dismissed and said writ denied and that we be hence dismissed.

IN WITNESS WHEREOF, I, J. WHITAKER THOMPSON, Judge of the District Court of the United States for the Eastern District of Pennsylvania, for and on behalf of myself and the other judges and officers of said Court, have hereunto set my hand and the seal of said Court this ninth day of December, A. D. 1921.

J. WHITAKER THOMPSON,
United States District Judge.

FOOD ADMINISTRATION (GRAIN) CORPORATION

42 BROADWAY, NEW YORK

272 BOURSE BLDG.,
PHILADELPHIA, PA.

17 STATE STREET
BALTIMORE, MD.

HERBERT HOOVER	Chairman
JULIUS H. BARNES	President
FRANK G. CROWELL	Vice-President
GATES W. McGARRAH	Treasurer
WATSON S. MOORE	Secretary
HOWARD M. SMITH	Assistant Secretary

	140# sacks	Weight-Lbs.
Soft Wht. Flour	71,367	9,991,380
Barley flour	13,953	1,953,420
Rye flour	1,211	169,540
Total	86,531	12,114,340
	Tierces	**Weight-Lbs.**
Pure Refined Lard	1,742	640,258
	Boxes	
Pure Refined Lard	10,250	574,000
	Half Bbls.	
Pure Refined Lard	366	40,992
Total		1,255,250
Total Weight		13,369,590 lbs.

FREIGHT AS AGREED.

ADMINISTRATION (GRAIN) CORPORATION

2 BROADWAY, NEW YORK

LDG., IA, PA. — **17 STATE STREET BALTIMORE, MD.**

OOVER	Chairman
BARNES	President
OWELL	Vice-President
CARRAH	Treasurer
MOORE	Secretary
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al Weight		13,369,590 lbs.

FREIGHT AS AGREED.

EXHIBIT A

BILL OF LADING

Copy

B/L Number.....

SHIPPED in good order and condition by the FOOD ADMINISTRATION GRAIN CORPORATION, on board the U. S. STEAMSHIP called the Western Maid Whereof E. O. Smith is master, and now lying in the Port of New York and bound for Falmouth, England, for orders To say Destination as ordered on arrival Falmouth, England being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the Port of Falmouth, England, or as ordered, unto the FOOD ADMINISTRATION GRAIN CORPORATION, CARE AIERICAN EMBASSY, LONDON, ENGLAND, or to his or their assigns c/o Chief Quartermster, A. E. F., France. All the conditions and exceptions of the Charter Party or agreemen now existing between the War Department of the United States and the United States Shipping Board applicable to this vessel are hereby incorporated herein and are to be deemed apart hereof.

General Average, if any, to be stated at the Port of New York and payable according t York-Antwerp Rules 1890 and Antwerp Rule 1903, and as to matters not covered hereby, according to the custom and practice of the Port of New York.

In Witness Whereof, the Master or Agent of the said Ship hath affirmed to 2 Bills of Lading all of his tenor and date numbered consecutively, one of which being accomplished, the others to tand void.

Dated in New York this 13th day of January, 1919.

For the Supt. of Water Transportation, Port of New York

J. D. CUSHING,
Master or Agents.
Major Q. M. Corps

CHART

TOO

LARGE

FOR

FILMING

WM. R. STANSBURY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 21 Original.

In the Matter

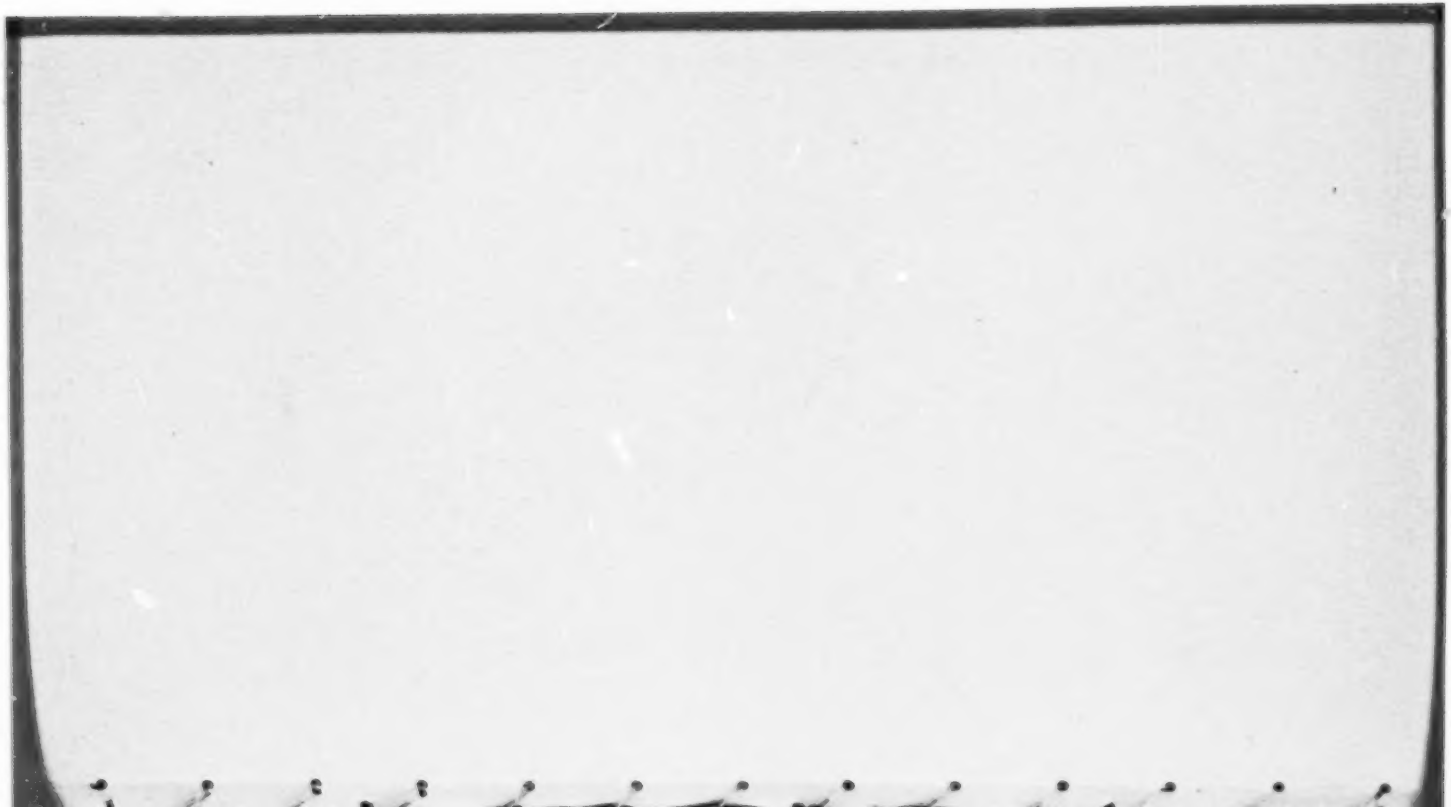
of

UNITED STATES OF AMERICA, Owner of the Steamship "Western Maid," for a Writ of Prohibition and/or Mandamus, Petitioner,

—against—

HONORABLE J. WHITAKER THOMPSON, Judge of the District Court of the United States for the Eastern District of Pennsylvania, and the other judges and officers of said Court.

RETURN.



IN THE

Supreme Court of the United States

October Term, 1921.

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In the Matter of

UNITED STATES OF AMERICA, OWNER OF THE STEAMSHIP "WESTERN MAID," FOR A WRIT OF PROHIBITION AND/OR MANDAMUS, PETITIONER,

against

HONORABLE J. WHITAKER THOMPSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT.

RETURN.

I, J. WHITAKER THOMPSON, Judge of the District Court of the United States for the Eastern District of Pennsylvania, for and in behalf of myself and the other judges and officers of said Court, in obedience to the order to show cause herein, issued out of the Supreme Court of the United States on the eleventh day of April 1921, on the petition herein, directing me and the other judges and officers of said Court to show cause why a Writ of Prohibition should not issue against me and the other judges and officers of said Court, and why a Writ of Mandamus should not issue against me in accordance with the prayer of the petition, hereby appear, certify and make return as follows:

Answering generally the said petition, the determination of the question of jurisdiction was based solely upon facts which appeared before the court, as set out in the Libel and in the Suggestion of Want of Jurisdiction, filed by Francis Fisher Kane, United States Attorney for the Eastern District of Pennsylvania, and the Exhibits "A" and "B" attached thereto; the Affidavit of Howard M. Smith, attached; and the Memorandum from Mr. Hoover, dated November 16, 1918, and the record then filed in said cause, all of which are set forth in the petition, pages 14 to 33 inclusive, and are made part of this return, and it is respectfully submitted that any additional averments and allegations of fact in the petition contained, should not be considered in the question now presented to the Court.

Answering specifically secions 1 to 3, inclusive, of the said petition, the statements therein, insofar as they are a recital of the statements contained in the Libel and Suggestion of Want of Jurisdiction, are admitted as being the statements upon which the judgment of the Court was founded, but it was not made to appear to the Court otherwise than as appears from the statements contained in the Suggestion of Want of Jurisdiction, that the steamship "Western Maid" was employed at the time of the collision in the furtherance of military operations.

In the Affidavit of Howard M. Smith, and the memorandum of Herbert Hoover, filed by the United States of America, with and as a part of its Suggestion of Want of Jurisdiction herein, it appeared that the steamship "Western Maid" was employed at the time of the collision, to wit, January 10, 1919, in the carriage of flour and packinghouse products, purchased by the War Department in co-ordination with the United States Food Administration, and intended to be sold to the civil propulations of Europe.

Answering section 4 of said Petition, the statements therein are as set forth, with the exception that this Court is not now proceeding to hear and determine the merits of the Libel.

Answering section 5 of said Petition, the United States, made claim for said steamship in said court and caused to be filed of record a stipulation for value executed by the United States Shipping Board, Emergency Fleet Corporation, which has been substituted for the steamship "WESTERN MAID" as respondent.

Answering section 6 of said Petition, the statements therein are true.

Answering section 7 of said Petition, it is respectfully submitted that the respondent is not required to answer a question of fact "now represented" by the Petition. For the reason that the question raised must be based upon the facts as they appeared from the libel and suggestion filed, the respondent does not undertake to answer whether or not it is true as alleged in the petition that "at the time of the collision the 'WESTERN MAID' was a commissioned vessel of the Navy and employed by her sovereign owner as an army cargo transport serving military needs."

Further answering, it was shown to the respondent by the Certificate of Registry of the said vessel, filed as Exhibit "B," with the Suggestion of Want of Jurisdiction, that at the time of the collision the said vessel was owned by the United States of America, represented by the United States Shipping Board and was allocated by the United States Shipping Board to the War Department.

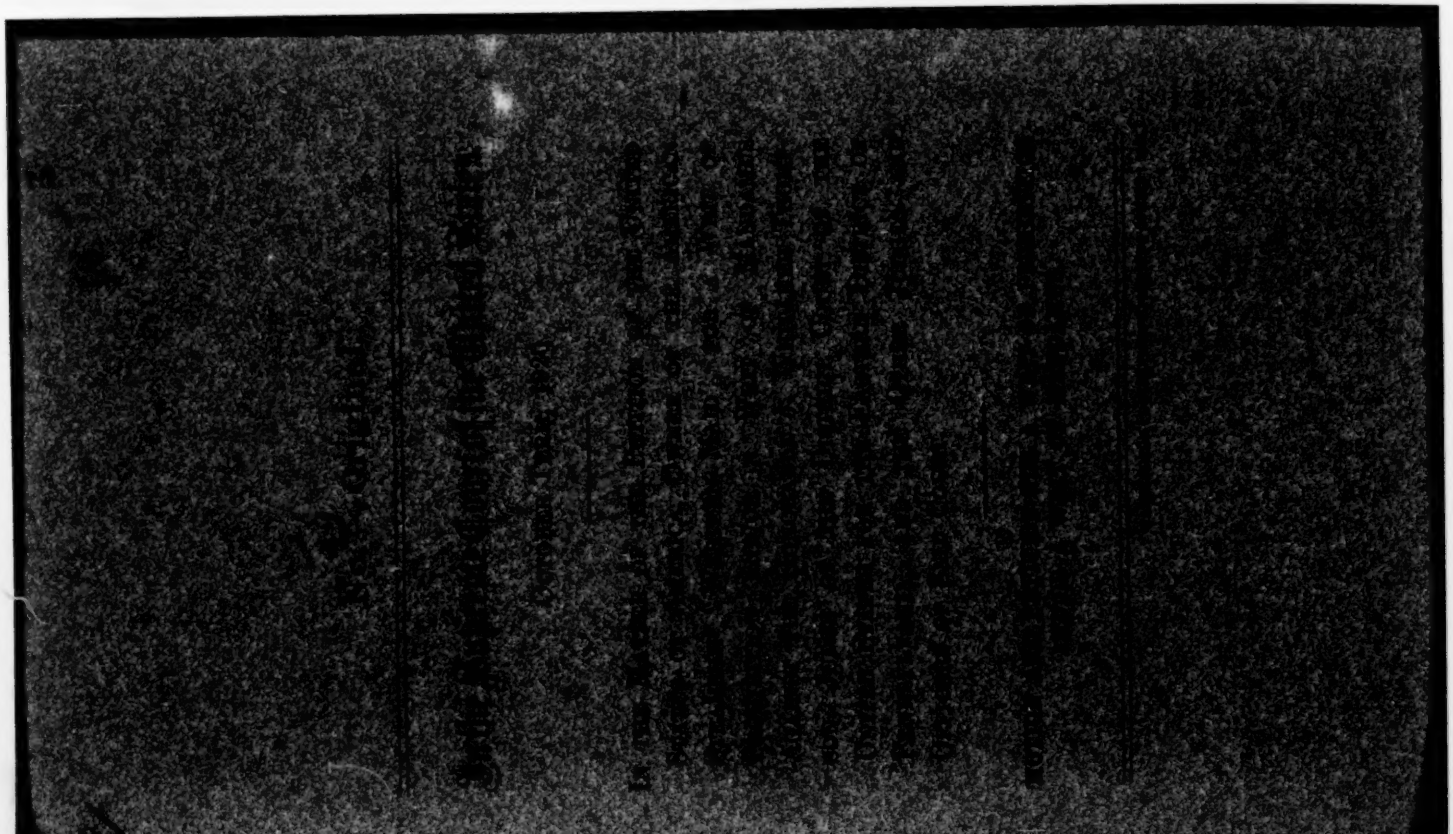
Further answering section 7 of said Petition, it is respectfully submitted that the question whether a liabiliy or maritime lien was created by the collision, against the steamship "WESTERN MAID" is not a question of jurisdiction, but is a question on the merits

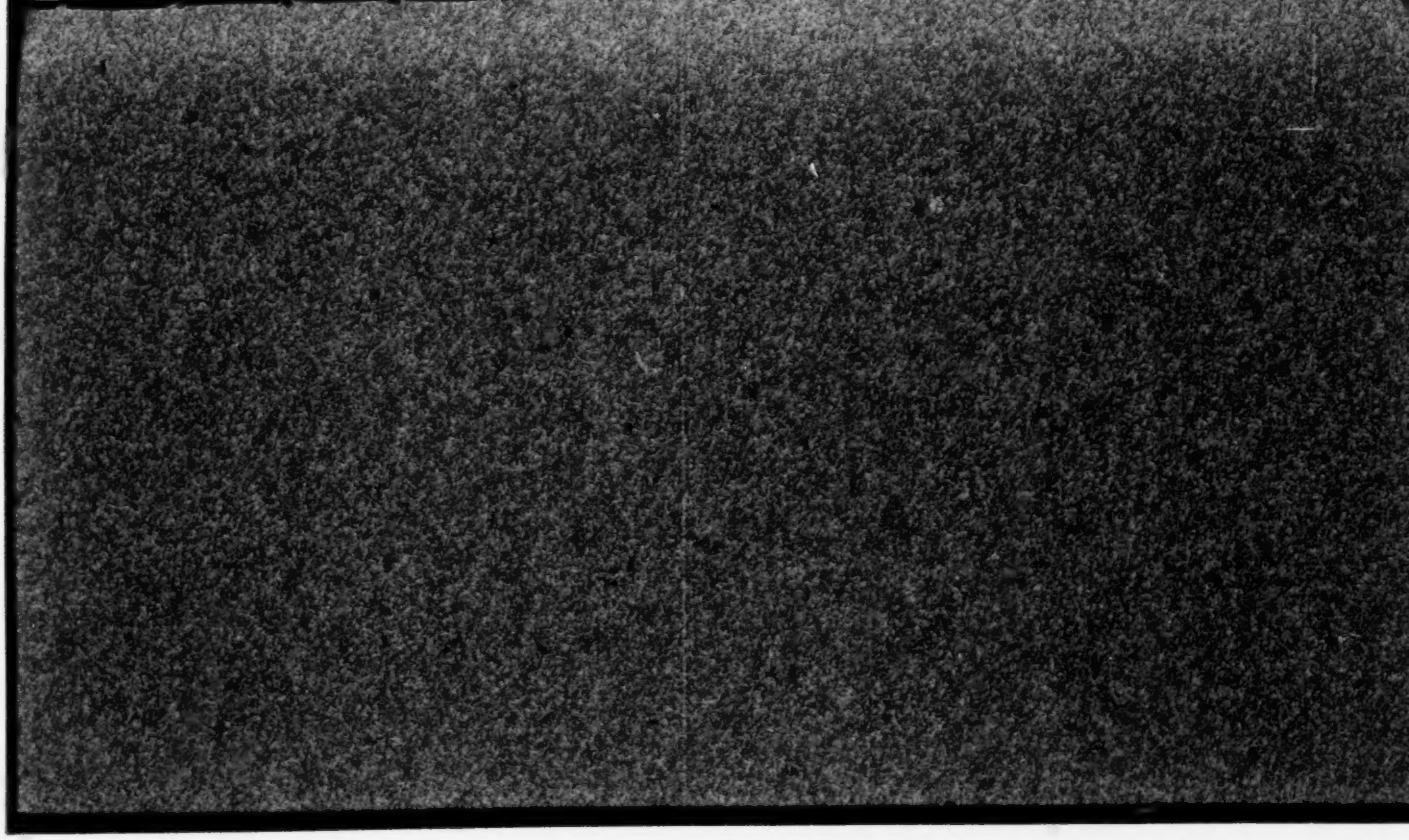
depending upon whether or not the Court finds at the trial that the "WESTERN MAID" was at fault and was employed as a merchant vessel. It is further respectfully submitted that the tort sued upon is not a tort of a naval officer, but a tort of the vessel herself; that the steamship "WESTERN MAID" upon the facts appearing from the libel and suggestion filed was not, either at the time of the collision or at the time of the issuance and execution of process, immune from liability, or maritime lien for said collision damages; that it is the opinion of your respondent that by virtue of section 9 of the Shipping Act of November 7, 1916, the petitioner has consented to suit; that said Court has jurisdiction of the subject matter of the suit, had at the time of the issuance and execution of process jurisdiction of the *res*, and by substitution of the United States Shipping Board Emergency Fleet Corporation as respondent in lieu of the *res*, has jurisdiction at present, and has properly exercised its judicial powers to proceed, hear and determine said question.

And having fully answered on behalf of myself and the other judges and officers of said Court, I respectfully submit that said rule should be dismissed and said writs denied, and that we be hence dismissed.

IN WITNESS WHEREOF, I, J. WHITAKER THOMPSON, Judge of the District Court of the United States for the Eastern District of Pennsylvania, for and in behalf of myself and the other judges and officers of said Court, have hereunto set my hand and the seal of said Court this seventh day of October, 1921

J. WHITAKER THOMPSON,
(Seal of Court) *United States District Judge.*





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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

NO. —, ORIGINAL.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, AS OWNER OF THE AMERICAN STEAMSHIP "WESTERN MAID."

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

And now comes Harry M. Daugherty, Attorney General of the United States, on behalf of the United States of America, owner of the steamship *Western Maid*, and moves:

1. For leave to file the petition for a writ of prohibition and/or a writ of mandamus, hereto annexed, and

2. That a rule be entered and issued directing the District Court of the United States for the Eastern District of Pennsylvania and the Honorable J. Whitaker Thompson, a judge thereof, and the other judges and officers of said court, to show cause why a writ of prohibition and/or a writ of mandamus should not issue aganst them and each of them, in accordance with the prayer of said petition, and why the United States of America should not have such other and further relief therein as may be just.

HARRY M. DAUGHERTY,
Attorney General for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

NO. —, ORIGINAL.

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA, OWNER OF THE AMERICAN STEAMSHIP "WESTERN MAID," FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS, AGAINST THE HONORABLE J. WHITAKER THOMPSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT.

PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

To the honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Harry M. Daugherty, Attorney General of the United States, on behalf of the United States of America, owner of the American steamship *Western Maid*, against the Honorable J. Whitaker Thompson, a judge of the District Court of the United States for the Eastern District of Pennsylvania, sitting in admiralty, and against the other judges and officers of said court, respectfully represents:

First. That on November 8, 1919, the British Tanker Company Ltd. (amended name, British Petroleum Company, Ltd.), owner of the British steamship *British Isles*, filed a libel in the District Court of the United States for the Eastern District of Pennsylvania, in admiralty, against the steamship *Western Maid*, to recover damages in the sum of $40,000, resulting from collision between the vessels on January 10, 1919, in New York Harbor, New York. It prayed that process, according to the course and practice in causes of admiralty and maritime jurisdiction, may issue against the steamship *Western Maid*, and that the court decree to libellant its damages, and that the said steamship be condemned and sold to satisfy the same. A copy of the libel, as part of the record of proceedings in said court, is hereto annexed.

Second. That the status of the steamship *Western Maid* was and is as follows:

The *Western Maid*, while in course of construction, was requisitioned by the United States, pursuant to the authority and direction embodied in the Executive order of July 11, 1917, made by the President by authority vested in him by the section entitled "Emergency shipping fund" of the act of Congress approved June 15, 1917, entitled "An act making appropriations to supply urgent deficiencies in appropriations by the Military and Naval Establishments on account of war expenses for the fiscal year ending June 15, 1917, and for other purposes," and then was

completed and documented in its name. At all times since the *Western Maid* has been owned by the United States and has been in its possession and control.

On January 10, 1919, the date of said collision, the steamship *Western Maid*, manned by a commissioned crew of the United States Navy, was employed in the furtherance of military operations as an Army cargo transport.

At the time of the filing of the libel aforesaid and the arrest and attachment of the *Western Maid* thereunder, the said steamship had been delivered by the War Department to the United States Shipping Board and was employed in merchant service.

Third. That thereafter Francis Fisher Kane, then the United States attorney for the eastern district of Pennsylvania, specially appearing on behalf of the United States for the purpose of questioning the jurisdiction of said court to proceed in said cause, filed of record suggestion that inasmuch as the steamship *Western Maid* was owned by the United States at the time of the collision and was manned by the Navy and employed by the War Department as a cargo transport carrying quartermaster's supplies abroad, she was immune from liability for collision damages, and the said court was without jurisdiction to proceed against the vessel or to hear and determine the matters alleged in said libel. Copies of said suggestion and supporting affidavits, as part of the record of proceedings in said court, are hereto annexed.

Fourth. That thereafter the matter came on for hearing before the Honorable J. Whitaker Thompson, one of the judges of said court, upon the right of said court to assume jurisdiction of or otherwise to hear and determine the matters alleged in said libel, who handed down an opinion in which, while finding that the *Western Maid* at the time of the collision was an Army cargo transport belonging to the United States and employed in carrying supplies in the usual manner of transmission of quartermaster's supplies consigned to the chief quartermaster of the American Expeditionary Forces abroad, nevertheless assumed jurisdiction upon the theory that the happening of the collision impressed upon such Army transport a lien liability for resulting damages, which, while not then enforceable, survived and became enforceable upon and during the vessel's commitment to merchant service. Thereupon the said court assumed jurisdiction of the said libel and is proceeding to hear and determine the merits thereof. Copy of the opinion of the court, as part of the record of proceedings in said court, is hereto annexed.

Fifth. That in order to avoid detention to the said steamship *Western Maid* by her seizure, arrest or attachment, which would seriously interfere with her operation, but without conceding or recognizing any rights of the said court to enforce by process such seizure, arrest or attachment, and reserving the right of the United States to question the jurisdiction of the court therein, the United States of America duly made claim for said steamship in said court, and

caused to be filed of record, a stipulation executed by the United States Shipping Board Emergency Fleet Corporation, conditioned for the payment of any award made under the final decree of the court in said proceedings. Copies of said claim and stipulation, as part of the record of proceedings in said court, are hereto annexed.

Sixth. That a certified copy of the records of proceedings in said District Court of the United States for the Eastern District of Pennsylvania, filed in the said cause, is hereto annexed and made a part hereof.

Seventh. That it is now represented that inasmuch as, at the time of the collision, the *Western Maid* was a commissioned vessel of the Navy and employed by her sovereign owner as an Army cargo transport, serving military needs, she was immune from liability for said collision damages. Further, that said libel proceedings, in substance and effect, is an action against your sovereign petitioner and presents a claim for tort arising out of a collision alleged to have resulted from the incompetence or want of skill of naval officers commissioned to man and operate an Army transport, and that for the liability of such losses this sovereign petitioner has not consented to suit. By reason thereof, the said District Court was, and is, without jurisdiction to proceed to hear and determine the matters alleged in said libel *in rem* filed against said steamship.

Wherefore, the said Harry M. Daugherty, Attorney General of the United States, the aid of this honorable court respectfully requesting, prays:

1. That a writ of prohibition may issue out of this honorable court to the said Honorable J. Whitaker Thompson, judge of the United States District Court, for the Eastern District of Pennsylvania, and/or the other judges and officers of said court, prohibiting him and them from taking any steps whatsoever in the cause aforesaid, and, generally, from the further exercise of jurisdiction in said cause, or the enforcing of any order, judgment, or decree made under color thereof.

2. That a writ of mandamus be issued out of and from this honorable court, directing and commanding the Honorable J. Whitaker Thompson, judge of the United States District Court for the Eastern District of Pennsylvania, to vacate the order so entered by him, directing that process issue against the said steamship *Western Maid*, as prayed for in the libel filed in said cause, and to vacate and cancel the claim of the United States of America, required to be filed to obtain the release of said steamship, and the stipulation of the United States Shipping Board Emergency Fleet Corporation filed therein, and, further, to enter an order in said cause declaring the said steamship *Western Maid* immune from liability for said collision damages.

3. That the court grant to the United States of America such other and further relief as may be just in the premises.

HARRY M. DAUGHERTY,
Attorney General of the
United States of America.

I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

HARRY M. DAUGHERTY.

Subscribed and sworn to before me this 25th day of March, 1921.

JULIA B. RISHEL,

[SEAL.] *Notary Public, District of Columbia.*

TRANSCRIPT OF RECORD OF PROCEEDINGS IN DISTRICT COURT.

DOCKET ENTRIES.

In the District Court of the United States for the Eastern District of Pennsylvania. *British Tanker Company (Ltd.)* v. *S. S. Western Maid.* No. 77 of 1919.

Nov. 8, 1919. Libel filed.

Order of court fixing stipulation in $46,000 directing process to issue.

Stipulation for costs by British Tanker Company (Ltd.) with International Fidelity Insurance Company surety, in $250 drawn, acknowledged, and filed.

Attachment exit, returnable November 14, 1919.

Nov. 12, 1919. Claim filed.

Nov. 13, 1919. Attachment returned "attached" and filed.

Nov. 14, 1919. Appearance of Francis Fisher Kane for purpose of objecting to jurisdiction filed.

Nov. 20, 1919. Stipulation of United States Shipping Board Emergency Fleet Corporation in the sum of $46,000 filed.

Order of court approving stipulation filed.

Feb. 19, 1920. Suggestion of want of jurisdiction filed.

Exhibit A filed.

Feb. 25, 1920. Præcipe to place case on argument list filed.

Apr. 5, 1920. Rule for commission on behalf of libellant filed.

Interrogatories filed.

May 19, 1920. Affidavit as to status of *Western Maid* filed.

Suggestion of want of jurisdiction argued.

May 27, 1920. Acceptance of service of rule for commission and interrogatories filed.

Commission on behalf of libellant to Hull, England, exit.

July 8, 1920. Opinion, Thompson, J., dismissing suggestion of want of jurisdiction and overruling objection to jurisdiction.

Oct. 9, 1920. Commission to Hull, England, returned and filed.

Nov. 24, 1920. Amended libel filed.

Nov. 24, 1920. Agreement of counsel as to filing amended libel filed.

LIBEL IN REM.

Filed Nov. 8, 1919. No. 77 of 1919. The libel and complaint of the British Tanker Company (Ltd.) against the steamship *Western Maid*, her engines, boilers, etc., and all persons intervening herein in their interests, in a cause of collision, civil and maritime, alleges on information and belief and respectfully shows to this honorable court as follows:

To the honorable the judges of the United States District Court for the Eastern District of Pennsylvania:

First. That at and during all the times hereinafter mentioned, your libellant was and still is a foreign corporation, organized and existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland, and having an office and place of business at Gresham House, 240 Broad Street, in the city of London, in England.

Second. That at and during all the times hereinafter mentioned, your libellant owned and operated the steamship *British Isles*.

Third. That the steamship *Western Maid* is now or will be during the pendency of process herein within this district and within the jurisdiction of this honorable court.

Fourth. That at and during all the times hereinafter mentioned, and prior to and up to the time of the collision hereinafter mentioned, the steamship *British Isles* was tight, stanch, strong, and in all respects seaworthy, and properly manned and equipped.

Fifth. That on the 10th day of January, 1919, the Steamship *British Isles* was lying at anchor in New York Harbor off Stapleton, Staten Island. The weather was clear and there was a moderate breeze. The ship was swinging to the ebb tide and was well within the anchorage grounds. Her anchor lights were set and burning brightly. At about 9.35 p. m. the steamship *Western Maid* was observed approaching the steamship *British Isles* from the southward. As the *Western Maid* approached the *British Isles*, those in charge of her apparently lost control of her engines, and her port bow collided with the starboard side of the *British Isles* seriously damaging the steamship *British Isles*.

Sixth. That the aforesaid collision and consequent damage were not caused or contributed to by any fault, neglect or want of care on the part of the libellant or the said steamship *British Isles* or those in charge of her but were wholly and solely due to the fault, neglect and want of care of the steamship *Western Maid* and those in charge of her in the following among other particulars, which will be pointed out upon the trial of this action:

1. In that the steamship *Western Maid*, being the moving vessel, did not keep clear of the steamship *British Isles* which was at anchor.

2. In that the steamship *Western Maid* failed to maintain a proper and efficient lookout.

3. In that the steamship *Western Maid* failed to stop and reverse her engines when the danger of collision was or should have been apparent.

4. In that the steamship *Western Maid* was not in charge of a competente, pilot, master, and crew.

5. In that those in charge of the steamship *Western Maid*, after the danger of collision was or should have been apparent, took no proper means to avoid same.

6. In that the steamship *Western Maid* failed to navigate with reference to the steamship *British Isles* in ample time to avoid colliding with her.

Seventh. By reason of the premises, your libellant has sustained damage in the sum of forty thousand ($40,000) dollars, as nearly as the same can now be estimated, no part of which has been paid, although duly demanded.

Eighth. All and singular these premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore libellant prays that process in due form of law, according to the course and practice of this honorable court in causes of admiralty and maritime jurisdiction issue against the said steamship *Western Maid*, her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this honorable court be pleased to decree to your libellant its damages, with interest and costs, and that the steamship *Western Maid*, her engines, etc., be condemned and sold to satisfy the same, and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

HARRINGTON BIGHAM & ENGLAR,
Proctors for Libellant, 64 Wall Street,
New York City.

CONLEN, BRINTON & ACKER,
1935 Commercial Trust Bldg.,
Philadelphia, Pa.

STATE OF NEW YORK,

County of New York, ss:

O. R. Houston, being duly sworn, deposes and says that he is a member of the firm of Harrington, Bigham & Englar, proctors for the libellant herein; that he has read the foregoing libel and knows the contents thereof and that the same is true to the best of his knowledge, information, and belief.

That the reason this verification is made by deponent and not by libellant is that libellant is a foreign corporation and none of its officers is now within this jurisdiction.

That the grounds of deponent's knowledge and the sources of his belief are documents in his possession and statements made to him by the libellant.

O. R. HOUSTON.

Sworn to before me this 29th day of August, 1919.

[SEAL.] JOSEPH L. O'CONNELL,
Notary Public, Nassau County.

Cet. filed in N. Y. County, Clerk No. 105.

N. Y. County Register No. 1186.

Term expires Mar. 30, 1921.

(Indorsed:) Before Thompson, J. Let process issue. Stipulation fixed at $46,000.00. By the Court. Attest: E. G. Johnson, Deputy Clerk.

CLAIM.

Filed Nov. 12, 1919. In the District Court of the United States for the Eastern District of Pennsylvania. *British Tanker Company (Ltd.)* v. *Steamship Western Maid.* No. 77 of 1919.

And now, to wit, this eleventh day of November, 1919, the United States of America, by its proctor, Francis Fisher Kane, United States attorney for the eastern district of Pennsylvania, without admitting the jurisdiction of the said court in the cause, intervening for its interests as owner of the steamship *Western Maid*, appears before the honorable court and makes claim for the said steamship *Western Maid*, her engines, boilers, etc., and avers that the said steamship *Western Maid* was in the possession of the United States as owner at the time of the attachment herein, and that the United States is the true and bona fide owner of the said steamship and that no other person is owner thereof.

Wherefore, he prays to be admitted to defend accordingly, without admitting the jurisdiction of the said court in the cause, and without submitting the rights of the United States to said jurisdiction.

FRANCIS FISHER KANE,
Proctor for Claimant.

Eastern District of Pennsylvania, ss.

The President of the United States of America, to the Marshal of the Eastern District of Pennsylvania, greeting:

You are hereby commanded, in the name and by the authority of the United States, forthwith to seize

and attach the steamship or vessel, called the *Western Maid*, whereof John Doe is master, together with all and singular her engines, boilers, and machinery, tackle, apparel, and furniture as the same now are; and the same safely keep, to abide the final order and decree of the District Court of the United States for the Eastern District of Pennsylvania, in a certain plea, civil and maritime, therein prosecuted against the said steamship *Western Maid*, etc., by British Tanker Company (Ltd.), libellant, for damages for collision, etc. And you are further commanded, in the name and by the authority aforesaid, to cite and admonish the said John Doe, master, and generally all others herein concerned, so that they be and appear before the said District Court within fifteen days after service of this writ made upon them, together with a copy of the libel filed herein, then and there to show cause, if any they have, why the said S. S. *Western Maid*, etc., should not be condemned, etc., for the payment of the said damages for collision, etc. And how you shall have executed this writ do you make return together with this writ on the 14th day of November, A. D. 1919.

Witness the honorable, the judges of the said court at Philadelphia, this 8th day of November, A. D. 1919, and in the 144th year of the independence of the said United States.

[SEAL.] CHARLES F. FUNDINGER,
Deputy Clerk District Court United States,
Eastern District of Pennsylvania.

REQUIREMENTS OF ADMIRALTY RULES.

The answer, and in proceedings *in rem*, the claim also, shall be filed, and a copy of the answer shall be served upon the libellant or his proctor within fifteen days after the service of process.

In default thereof, a decree *pro confesso* may be entered in due course.

(Indorsed:) No. 77, of 1919. U. S. District Court, in admiralty. *British Tanker Co. (Ltd.)* v. *Steamship Western Maid.* Attachment. Plea civil et maritime. Ret. November 14, 1919. Filed November 13, 1919 George Brodbeck, clerk. Stipulation, $46,000. Conlen, Brinton & Acker, proctor for libellant.

NOVEMBER 8, 1919.

As commanded I have attached the steamship *Western Maid*, and have the same now in my custody, also cited the master, Captain Lumboch, by leaving a true and attested copy of the within with, together with a copy of the libel with D. J. Donovan, second mate in charge of said steamship, and making contents of same known to him on the date above mentioned.

So answers

FRANK J. NOONAN,
United States Marshal.
Per THOMAS MARPLE,
Deputy.

STIPULATION FOR RELEASE OF VESSEL.

In the United States District Court for the Eastern District of Pennsylvania. *British Tanker Company (Ltd.), Libellant*, v. *American Steamship Western Maid.* Filed Nov. 20, 1919.

Whereas a libel was filed on the 8th day of November, 1919, by the British Tanker Company (Ltd.), against the American steamship *Western Maid*, her engines, etc., for the reasons and causes in the said libel mentioned; and

Whereas, the said steamship *Western Maid* is now in the custody of the marshal in the above district, under process issued in accordance with the prayer of said libel, as ordered by the above entitled court; and

Whereas, without submitting the rights of the United States to the jurisdiction of the said court, a claim for the said steamship *Western Maid* has been filed by the United States of America by and through Francis Fisher Kane, United States attorney for the eastern district of Pennsylvania, and the value thereof has been fixed for the purpose of bonding at $46,000; and

Whereas the United States Shipping Board Emergency Fleet Corporation, as stipulator, hereby consents and agrees that in case of default or contumacy on the part of the said claimant, execution may issue against its goods, lands, and chattels in the sum of $46,000.

Now, therefore, the condition of this stipulation is such that if it shall hereafter be finally determined

that this court has jurisdiction to proceed in said cause, and if claimant herein and the United States Shipping Board Emergency Fleet Corporation, the stipulator undersigned, shall abide by all orders of the court interlocutory and final, and pay the amount awarded by the final decree rendered by such court or by any appellate court, if an appeal intervenes, then this stipulation shall be void, otherwise to remain in full force and virtue.

UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION,
By B. K. OGDEN,
Director of Insurance,
Stipulator.

Approved:

CHARLES F. DUTCH,
Admiralty Counsel.

Attest:
[SEAL.]

JOHN J. FLAHERTY,
Secretary.

Before Dickinson, J.
Bond approved.
By the court.
Attest:

GEORGE BRODBECK,
Clerk.

Nov. 20, 1919.

SUGGESTION OF WANT OF JURISDICTION.

In the District Court of the United States for the Eastern District of Pennsylvania. In admiralty. *British Tanker Company (Ltd.)* v. *S. S. Western Maid.* No. 77, 1919 term. Filed Feb. 20, 1920.

And now comes Francis Fisher Kane, United States attorney for the eastern district of Pennsylvania, appearing specially and not otherwise, as proctor for the United States of America, for the purpose of questioning the jurisdiction of the court in this cause, and respectfully suggests to the court that this honorable court is without jurisdiction to proceed herein, for the reason the S. S. *Western Maid*, on January 10, 1919, at the time of the collision mentioned in the libel filed in this case, was the property of the United States, in its possession and control, and employed in public service for national uses and purposes.

The status of the said S. S. *Western Maid* was and is as follows:

The said S. S. *Western Maid*, while in course of construction at Portland, Oregon, pursuant to the authority and direction embodied in the Executive order of July 11, 1917, a true copy of which is hereto attached, marked "Exhibit A" and made a part hereof, made by the President by virtue of the authority vested in him by the section entitled "Emergency shipping fund," of the act of Congress approved June 15, 1917, entitled "An act making appropriations to supply urgent deficiencies in appropriations

for the military and naval establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes," was requisitioned for the United States by the United States Shipping Board Emergency Fleet Corporation, as agent for the President, which, pursuant to said act and Executive order, completed and equipped said hull, the expenses incident thereto being duly paid in full out of the funds of the United States appropriated for such purposes.

That upon completion, said steamship was delivered to and received by the United States Shipping Board, as agent for the President, which duly caused said steamship to be registered in the name of the United States of America as owner, at the port of Portland, Oregon. A copy of said certificate of registry is hereto attached, marked "Exhibit B" and made a part hereof. At all times the said steamship has been continuously owned by the United States of America and now is.

That thereafter, to wit, January 10, 1919, the said steamship was allocated by the United States Shipping Board to the War Department of the United States for use and employment in its transport service; that the War Department caused said vessel, during its service as a transport, to be manned by a Navy crew; that the collision described in the libel filed in this case occurred on January 10, 1919, after 1 p. m., after said steamship had been delivered to the War Department for service as a transport, and at the time it was manned by a Navy crew; that said steamship remained in such service and was so manned until March 20, 1919, when the vessel was delivered to the United States Shipping Board, which then assigned her to commercial service; that the said

steamship was used and employed in such service on November 8, 1919, when the writ of attachment in this cause was served upon the said steamship; that by reason of the ownership, employment, and service of the said S. S. *Western Maid*, which had the status of a public vessel at the time of the collision, the said S. S. *Western Maid* cannot be declared an offender or have impressed upon her collision liability so that any proceedings *in rem* can be maintained against her to recover for said collision damages; and that the said vessel is now free from seizure or attachment and this court is without jurisdiction to enforce said collision claim against said vessel.

Wherefore, for the reasons and causes above set forth, it is moved that the libel filed herein be dismissed for want of jurisdiction.

FRANCIS FISHER KANE,
United States Attorney for the
Eastern District of Pennsylvania.

EXHIBIT A.

EXECUTIVE ORDER DELEGATING TO THE SHIPPING BOARD AND THE EMERGENCY FLEET CORPORATION THE POWERS GRANTED THE PRESIDENT BY THE EMERGENCY SHIPPING LEGISLATION.

By virtue of authority vested in me in the section entitled "Emergency shipping fund" of an act of Congress entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct

that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

WOODROW WILSON.

THE WHITE HOUSE,
11 July, 1917.

EXHIBIT B.

DUPLICATE CERTIFICATE OF REGISTRY.

Cat. No. 1266.

(This form is for use in making duplicate of certificate of registry for Bureau of Navigation.)

Permanent Register No. 13.

Official No. 216754. Letters, LMKT.

The United States of America. Department of Commerce. Bureau of Navigation.

Measured: Portland, Oreg., 1918.

Radio call: K Q O O. Service: O. freight. Number of crew: 50.

In pursuance of chapter one, Title XLVIII, "Regulation of commerce and navigation," Revised Statutes of the United States. F. B. Pape, of Portland, Oregon, agent, having taken and subscribed the oath required by law, and having sworn that the United States, represented by the United States Shipping Board, is the only owner of the vessel called the *Western Maid*, of Portland, Oregon, whereof E. O. Smith is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1918, at Portland, Oregon, of steel, as appears by certificate of Ed. C. Pape, master carpenter, dated at Portland, Oregon, June 12, 1918, and J. H. Klippel, special surveyor, having certified that the said vessel is a steam screw; that she has two decks, two masts, a sharp head, and an elliptic stern; that her register length is 409.8 feet, her register breadth 54.2 feet, her register depth 27.7 feet, that she measures as follows:

	Tons.
Capacity under tonnage deck	5,138.92
Capacity between decks above tonnage deck double bottom	1,102.57

	Tons.	
Capacity of inclosures on the upper deck, viz, forecastle, 128.45; bridge, 31.45; poop, 150.34; houses—round, 160.49; saddle back, 7.82; chart, 6.39; radio, 15.77; excess hatchways, 44.12; light and air, 85.00		629.83
Gross tonnage		5,871.32
Deductions under section 4153, Revised Statutes, as amended:		
Crew space, 300.55; master's cabin, 16.68	317.23	
Anchor gear, 16.35; boatswain's stores, 57.85	74.20	
Charthouse, 6.39; radiohouse, 15.77	22.16	
Propelling power (actual space, 763.43), 32 per cent.	1,878.82	
Total deductions		2,292.41
Net tonnage		3,578.00

The following-described space, and no others, have been omitted, viz: Open bridge, 476.45; steering gear, 16.32; light and air, 16.00; wheelhouse, 5.21; galley, 14.49; water-closets, 2.06; cabins, companion house, 0.87.

And the said E. C. Pape having agreed to the description and admeasurement above specified, according to law, said vessel has been duly registered at this port.

Given under my hand and seal, at the port of Portland, Oregon, this 20th day of August, in the year one thousand nine hundred and eighteen.

WILL MOORE,
Collector of Customs.

(Indorsed:) Office of Collector of Customs, District of Oregon, port of Portland, Oregon. I hereby certify the within to be a true copy of the original on record in this office. Given under my hand and seal this 24th day of February, 1920. L. A. Pike, collector of Customs. Cat. No. 1266. O. N. 216754. Department of Commerce, Bureau of Navigation. Duplicate certificate of registry No. 13, of the steam screw called the *Western Maid*, of Portland, Oregon, 5,871 gross, 3,578 net. Issued at the port of Portland, Oregon, August 20, 1918.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Howard M. Smith, being duly sworn according to law, deposes and says: That he is now secretary to the United States wheat director and assistant secretary of the United Grain Corporation, successor to the Food Administration Grain Corporation, and during the year 1918 and 1919, had knowledge of the affairs and relations of the United States Food Administration. That on January 10th, 1919, the United States steamship *Western Maid*, then operated and controlled by the War Department but manned by a Navy Department crew, had loaded at the port of New York, a cargo of flour and packing-house products intended for the relief of the civilian populations of Europe, the said steamship *Western Maid* being bound for Falmouth, England, for orders. That the arrangements with regard to furnishing the foodstuffs for the relief of the civilian population of Europe, shipped aboard the steamship *Western Maid*, were that such cargo had been furnished by the War Department from emergency purchases made in the usual coordination with the United States Food Administration by authority of the President, November 12th, 1918, the War Department loading and shipping such supplies in the usual manner of transmission of the quartermaster supplies, and delivered in Europe to the chief quartermaster, American Expeditionary Forces, or to the United States Food Administration. A copy of the memorandum of such arrangements as approved by the President is hereto attached, marked "Exhibit A" and made a part hereof. That any moneys paid for such supplies were paid by the United States Treasury, Controller of the State and Other Departments, out of an appropriation of $100,000,000 made by act of Congress

approved February 14th, 1919, for the relief of the civilian population of Europe.

Further deponent avers that no freight charges have been paid by the United States Food Administration, or by the United States Grain Corporation for the transportation of said foodstuffs loaded aboard the steamship *Western Maid*.

HOWARD M. SMITH.

Sworn to before me this 18th day of May, 1920.

[SEAL.] C. N. HITCHCOCK,

Notary Public, New York Co., No. 1225.

New York Co. Clerks No. 189.

Certificate filed in N. Y. Co.

Commission expires March 30, 1921.

MEMORANDUM RECEIVED FROM MR. HOOVER, NOVEMBER 16, 1918.

NOVEMBER 12, 1918.

MEMORANDUM OF ARRANGEMENTS WITH REGARD TO PROVISIONING THE POPULATIONS WHICH ARE NOW OR HAVE BEEN UNDER THE DOMINATION OF THE CENTRAL EMPIRES.

1. Mr. Hoover, as United States Food Administrator, will proceed at once to Europe to determine what action is required from the United States and what extensions of the Food Administration organization or otherwise are necessary in order to carry out the work of the participation of the United States Government in this matter, and to take such steps as are necessary in temporary relief.

2. In order to expedite the movement of foodstuffs toward Europe, the War Department will undertake to purchase in the usual coordination through the Food Administration during the next twenty days, 120,000 tons of flour and from 30,000,000 to 40,000,000 pounds of pork products. These foodstuffs to be shipped by the diversion of Army tonnage at the earliest possible moment that the Shipping Board arranges, and to be consigned to French ports for reconsignment or storage.

3. Thus foodstuff and any other suitable surplus supplies of the quartermaster in Europe to be made available for distribution at Mr. Hoover's direction, it being understood that if it proves infeasible to reship or redirect the steamers to the territories lately held by the Central Empires, Mr. Hoover will make

OPINION.

UPON SUGGESTION OF WANT OF JURISDICTION.

In the District Court of the United States for the Eastern District of Pennsylvania. *British Tanker Co. (Ltd.)* v. S. S. *Western Maid.* No. 77 of 1919, in admiralty. Filed July 8, 1920.

THOMPSON, J.:

The libellant, owner of the steamship *British Isles* filed its libel against the *Western Maid* upon a cause of collision. The libel states that the collision occurred on the 10th of January, 1919, in New York Harbor through the fault of the *Western Maid.* The United States attorney specially appearing for the purpose has filed a suggestion of want of jurisdiction for the reason that at the time of the collision the *Western Maid* was operated and controlled by the War Department, manned by a Navy Department crew, and had loaded at the port of New York a cargo of foodstuffs for the relief of the civilian population of Europe. The cargo was furnished by the War Department from emergency purchases made in the usual coordination with the United States Food Administration by authority of the President. The War Department loaded and shipped such supplies in the usual manner of transmission of quartermaster supplies, to be delivered in Europe to the chief quartermaster, American Expeditionary Forces, or to the United States Food Administration. The moneys paid for such supplies were paid out of the United States Treasury under appropriation made by the

act of Congress of February 14, 1919, for the relief of the civilian population of Europe.

On March 20, 1919, the vessel was delivered to the United States Shipping Board and was assigned by it to commercial service, in which service it was employed at the time of the arrest November 8, 1919.

While it is conceded by the United States attorney that under the provisions of section 9 of the shipping act of November 7, 1916, the vessel would be liable to seizure for maritime causes of action occurring after March 20, 1919, it is contended that the court has no jurisdiction *in rem* against the vessel for a collision which occurred while it was in Government service engaged in transporting, under the authority of the President by virtue of the act of Congress, supplies furnished by the Government for relief of civilian population of Europe.

It is not open to controversy as it was in *The Jeannette Skinner* (258 Fed. 768), that at the time of the arrest the vessel was "employed solely as a merchant vessel within section 9 of the Shipping Board act of September 7, 1916."

Upon the main controversy whether a collision occurring while in strictly public service raises a liability against the vessel until it is capable of enforcement either by reason of becoming a privately owned vessel or under the provisions of section 9 of the shipping act, the case is on all fours with the case of *Nippon Yusen Kabushiki Kaisha* v. *S. S. Jeannette Skinner* recently decided by Judge Rose. The authorities are carefully reviewed and discussed by him in his opinion (as yet unreported). Upon the authorities cited and the reasoning upon which Judge Rose reached his conclusion, in which I fully concur, it is held that the court had jurisdiction *in rem* at the

time of the arrest for liability incurred by the collision while the vessel was in the public service of the Government.

The suggestion of the district attorney is dismissed and the objection to jurisdiction overruled.

AMENDED LIBEL.

The amended libel and complaint of the British Petroleum Company (Ltd.) against the steamship *Western Maid*, her engines, boilers, etc., and all persons intervening herein in their interests, in a cause of collision, civil and maritime, alleged on information and belief and respectfully shows to this honorable court as follows. Filed Nov. 24, 1920.

To the honorable the judges of the United States District Court for the Eastern District of Pennsylvania:

First. That at and during all the times hereinafter mentioned your libellant was and still is a foreign corporation, organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, and having an office and place of business at Gresham House, 240 Broad Street, in the city of London, in England.

Second. That at and during all the times hereinafter mentioned your libellant owned and operated the steamship *British Isles*.

Third. That the steamship *Western Maid* is now or will be during the pendency of process herein within this district and within the jurisdiction of this honorable court.

Fourth. That at and during all the times hereinafter mentioned, and prior to and up to the time of the collision, hereinafter mentioned, the steamship *British Isles* was tight, staunch, strong, and in all respects seaworthy and properly manned and equipped.

Fifth. That on the 10th day of January, 1919, the steamship *British Isles* was lying at anchor in New

York Harbor off Stapleton, Staten Island. The weather was clear and there was a moderate breeze. The ship was swinging to the ebb tide and was well within the anchorage grounds. Her anchor lights were set and burning brightly. At about 9.35 p. m. the steamship *Western Maid* was observed approaching the steamship *British Isles* from the southward. As the *Western Maid* approached the *British Isles* those in charge of her apparently lost control of her engines, and her port bow collided with the starboard side of the *British Isles* seriously damaging the steamship *British Isles*.

Sixth. That the aforesaid collision and consequent damage were not caused or contributed to by any fault, neglect, or want of care on the part of the libellant or the said steamship *British Isles* or those in charge of her, but were wholly and solely due to the fault, neglect, and want of care of the steamship *Western Maid* and those in charge of her in the following, among other particulars, which will be pointed out upon the trial of this action:

1. In that the steamship *Western Maid*, being the moving vessel, did not keep clear of the steamship *British Isles*, which was at anchor.

2. In that the steamship *Western Maid* failed to maintain a proper and efficient lookout.

3. In that the steamship *Western Maid* failed to stop and reverse her engines when the danger of collision was or should have been apparent.

4. In that the steamship *Western Maid* was not in charge of a competent pilot, master, and crew.

5. In that those in charge of the steamship *Western Maid*, after the danger of collision was or should have been apparent, took no proper means to avoid same.

6. In that the steamship *Western Maid* failed to navigate with reference to the steamship *British Isles* in ample time to avoid colliding with her.

Seventh. By reason of the premises, your libellant has sustained damage in the sum of forty thousand ($40,000) dollars, as nearly as the same can now be estimated, no part of which has been paid, although duly demanded.

Eighth. All and singular these premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore libellant prays that process in due form of law, according to the course and practice of this honorable court in causes of admiralty and maritime jurisdiction, issue against the said steamship *Western Maid*, her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this honorable court be pleased to decree to your libellant its damages, with interest and costs, and that the steamship *Western Maid*, her engines, etc., be condemned and sold to satisfy the same, and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

CONLEN, BRINTON & ACKER.
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant, 64 Wall Street,
New York City.

STATE OF NEW YORK,
County of New York, ss:

T. Catesby Jones, being duly sworn, deposes and says: That he is a member of the firm of Harrington, Bigham & Englar, proctors for the libellant herein; that he has read the foregoing libel and knows the

contents thereof and that the same is true to the best of his knowledge, information, and belief.

That the reason this verification is made by deponent and not by libellant is that libellant is a foreign corporation and none of its officers is now within this jurisdiction.

That the grounds of deponent's knowledge and the sources of his belief are documents in his possession and statements made to him by the libellant.

T. CATESBY JONES.

Sworn to before me this 25th day of October, 1920.

[SEAL.] JOSEPH L. CONNELL,
Notary Public.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, George Brodbeck, clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and correct copy of the docket entries; libel in rem, filed Nov. 8, 1919; claim, filed Nov. 12, 1919; writ of attachment with marshal's return, filed Nov. 15, 1919; stipulation for release, in sum of $46,000, filed Nov. 20, 1919; suggestion of want of jurisdiction, with Exhibits A and B, filed Feb. 20, 1920; affidavit as to status of S/S *Western Maid*, filed May 19, 1920; opinion, Thompson, J., upon suggestion of want of jurisdiction, filed July 8, 1920; amended libel, filed Nov. 24, 1920; in the case of *British Tanker Company (Ltd.)*, v. *S/S Western Maid*, No. 77 of 1919, in admiralty; now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said District

Court at Philadelphia, this fifteenth day of March, in the year of our Lord one thousand nine hundred and twenty-one and in the 145th year of the independence of the United States.

[SEAL.] GEORGE BRODBECK,
Clerk District Court United States,
Eastern District of Pennsylvania.
By GILBERT W. LUDWIG,
Deputy Clerk.

MEMORANDUM IN SUPPORT OF APPLICATIONS.

I.

STATEMENT OF CASE.

The *Western Maid* owned by the Government, while manned by the Navy and employed as an Army cargo transport carrying quartermaster's supplies abroad was in collision with the British steamship *British Isles*. Upon the *Western Maid's* release from transport service and her employment in merchant service, the owners of the *British Isles* filed a libel *in rem* against her to recover such collision damages. The Government promptly filed its suggestion representing that as the *Western Maid* was a commissioned vessel of the Navy and employed by her sovereign owner as an Army cargo transport serving military needs, she was immune from liability or lien for such collision and the District Court was without jurisdiction to hear and determine the merits of the libel. The District Court overruled the suggestion and assumed jurisdiction upon the theory that such collision impressed upon such Army transport a collision lien or liability, which, while then not enforceable, survived or lived with the vessel, and became enforceable upon and during her commitment to merchant service.

The Government denies jurisdiction in the District Court, (1) because inasmuch as at the time of the

collision the *Western Maid* was a transport, employed by her sovereign owner to serve military needs, she was immune from liability or lien for such collision damages; and (2) because such proceeding, in substance and effect, is an action against the Government for tort, arising out of a collision, alleged to have resulted from the incompetence or want of skill of naval officers commissioned to man the vessel and that for the liability for such losses, this Government has not consented to suit.

II.

Importance of question.

There are pending in the several district courts more than two hundred libel proceedings, involving many millions of dollars, in every one of which there is suggested the jurisdictional questions here presented. It is urgent and of public importance that such jurisdictional questions now be reviewed by this court.

III.

Classes of Government vessels.

A statement of the classes of vessels controlled by the Government during the war period is essential. They are: (*a*) armed public vessels; (*b*) unarmed public vessels; (*c*) merchant vessels.

(*a*) *Armed public vessels* consisted of Government owned or requisitioned and chartered vessels on the bare boat basis, of adaptable designs, which were converted into fighting ships. Included were tugs and smaller steamships equipped with mine-laying

and mine-sweeping devices which were employed in such operations. After the war the Government removed the fighting gear, reconditioned the vessels, and redelivered them to owners, who then obtained proper merchant licenses and placed them in merchant service.

(*b*) *Unarmed public vessels* consisted of Government owned or requisitioned and chartered vessels on the bare boat basis, which were converted into partially armed or unarmed transports—carriers of troops and of ammunition, food and clothing for the American Expeditionary Forces abroad. Many were employed as Army and Navy dispatch boats in and about the harbors. Vessels so requisitioned and chartered after the war had their Government gear removed, then were reconditioned and redelivered to owners, who obtained proper merchant licenses and placed them in merchant service. The *Western Maid, Carolinian,* and *Liberty* belong to this class.

(*c*) *Merchant vessels* consisted of Government owned or requisitioned vessels which were carriers of cargo and passengers for hire. The operation of each was a business enterprise designed for profit.

The jurisdictional questions now presented relate solely to vessels of classes (*a*) and (*b*), and not to vessels of class (*c*). The Government, by legislation, has waived its immunity with respect to merchant vessels, class (*c*) (*The Lake Monroe,* 250 U. S. 246), and has consented to suit. It has not waived immunity from liability or lien with respect to its armed or unarmed public vessels—classes (*a*) and (*b*).

IV.

Related Legislation.

Section 9 of the Shipping Board act of September 7, 1916 (c. 451, 39 Stat., 728, 730), creates liability when the service of Government vessels at the time of the collision is purely commercial. By the terms of the act, such vessels then become subject to the ordinary liabilities of merchant vessels notwithstanding the indirect interest of the Government. (*The Lake Monroe*, 250 U. S., 246.) Manifestly this act does not relate to armed or unarmed public vessels of classes (*a*) and (*b*).

As merchant vessels owned by the Government were subject to judicial processes, occasioning delays and requiring the Government to incur unnecessary expense in providing bonds to effect their release from attachment, the act of March 9, 1920 (c. 95, 41 Stat., 525), entitled "An act authorizing suits against the United States in admiralty, etc.," was passed. The act substituted process *in personam* against the Government in place of process *in rem* against its vessels. However, the act limited its scope of jurisdiction solely over matters arising out of the operation of vessels in merchant service.

Many vessels then were sold by the Government to private owners. Sections 1 and 2 of the act declared vessels exempt from arrest only while owned by the Government. To take care of liabilities alleged to have arisen during the period of Government operation and ownership, but sought to be

enforced against the vessels *in rem* after their sale and delivery to private owners, section 4 provided:

> That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libellant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this act.

This section, however, did not enlarge the jurisdiction of the courts. The United States by filing such suggestion only "assumes the liability for the satisfaction of any decree obtained by the libellant in such cause." Such suggestions are claims for the vessels and effect the release of the vessels from arrest or attachment without filing bond or stipulation. In the *Carolinian* and *Eureka* cases suggestions under section 4 have been filed.

V.

The District Court was without jurisdiction.

The Government in all these cases has filed its suggestion of want of jurisdiction, wherein, after defining the status of the vessels at the time of the collisions, it declares their immunity from lien liabilities and denies jurisdiction in the district courts to hear and determine the merits of the libels.

Immunity of Government transports from liabilities or liens for collision torts.

The question thus presented is not one of immunity from process of the court, but one of immunity from liability for collision liens. The transports, by the happening of the collision, were exempt from the creation of any liability or lien against them. The doctrine of the immunity of the sovereign includes immunity from liability or lien.

Mr. Justice Holmes, in delivering the opinion of this court in *Kawananakoa* v. *Polyblank* (205 U. S. 349, 353), thus stated the doctrine:

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes (*Leviathan*, c. 26, 2). A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground *that there can be no legal right as against the authority that makes the law on which the right depends.*

Army transports serving military needs are part of the sovereign State, and their liabilities are merged in that of the sovereign State. Under such circumstances redress must be sought from the sovereign, and not from the instruments (vessels) it employs in military service. The law passes by the vessel and places the liability, if any, on the sovereign State alone and not upon its maritime instruments of sovereignty. The law is best stated by former Chief Justice Waite, then sitting on the Circuit Bench for the Southern District of New York, in *The Fidelity* 16 Blatchford, 569, 572, 573; 8 Federal Cases, 4758:

> A careful examination of the cases satisfied me that the exemption of public vessels from suits in admiralty arises not out of a want of power to sue the public owner, but out of a want of liability on the part of the vessel. A public vessel is part of the sovereignty to which she belongs and her liability is merged in that of the sovereign. Under such circumstances redress must be sought from the sovereign and not from the instruments he uses in the exercise of his legitimate functions. *Public creditors look to the public faith for their security and not to the public property.* But it is insisted that during the public ownership the maritime liability of the vessel may be incurred, although the remedy in admiralty is suspended. If this be so, the seamen employed on vessels of war, if their wages are not paid and their vessel is sold to private owners, to be employed in the ordinary business of commerce, may libel the vessel in the hands of

her private owners to secure their money. A simple statement of such a proposition is all that is required to show its fallacy. *The real truth is that in such cases the maritime law passes by the thing and places the liability on the sovereign owner alone and not upon the maritime instrumentalities of his sovereignty.* The cases of *The Davis*, 10 Wall. (77 U. S.) 15, and *The Siren*, 7 Wall. (74 U. S.) 152, are not at all in conflict with this. * * * I do not understand that *The Siren* and *The Davis, supra*, go further than to decide that the property of the Government not devoted to the public use is subject to such liens.

Pertinent observations made by the Court of Appeals of England in the *Parlement Belge* (4 Asp. M. C. at 234) are instructive:

Brett, L. J.:

> I doubt very much whether a maritime lien would attach to a vessel after leaving the Government service for damage done by her whilst in the service.

Baggley (p. 237):

> Suppose damage is done *by a ship of war* which is subsequently sold by the Government to a private individual, do you *say* that a lien would attach to her in the hands of her new owner for the damages done whilst a vessel of war?

Page 241:

> We think he (sovereign) can not be indirectly pleaded any more than he could be directly pleaded.

The argument of the King's advocate in the case of *The Prins Frederik* (2 Dods. 451), is sound and persuasive.

To conclude that the collision creates a lien liability of the vessels will permit, by indirection, the recovery of tort claims against the Government, which otherwise are without redress.

Liens can not be acquired or enforced upon or against public property.

> *Board of Commissioners* v. *O'Connor*, 86 Ind. 531, 537.
>
> *Rowley* v. *Conklin*, 89 Minn. 172, 175.
>
> *Briggs* v. *A Light Boat*, 7 Allen, 287, 297.

The rule of reason is that when a vessel enters upon her sovereign's public service, her identity is merged in her sovereign. When her devotion to public service ceases and she becomes an instrument in merchant service, she assumes a new personality—a merchant vessel—unhampered by any liens or claims alleged to have arisen against her during her public service.

This rule finds support in the fact that no reported cases, prior to the armistice, are known where foreign subjects or our own citizens, have attempted to recover collision damages inflicted by a public vessel, devoted to military service, by proceeding *in rem* against such vessel after she has been sold or released by the Government and placed in commercial service.

These Libels, in Substance and Effect, Are Actions Against the Government.

These libel proceedings, while filed *in rem* against vessels, in substance and effect, are actions against the Government and present claims for collision torts alleged to have resulted from the incompetence or want of skill or naval officers commissioned to man transports. For such liability this Government has not consented to suit. There is no distinction between suits against the United States and suits against its property. Suits against the property of the United States are in effect suits against the United States. (*Stanley* v. *Schwably*, 147 U. S. 508, 512.)

The Government is an indispensable party to any proceeding *in rem*, in which its public vessels are sought to be subjected to the payment of its obligations. (*Christian* v. *Atlantic & N. C. R. R.*, 133 U. S. 233, 241.)

VI.

Theory Upon Which District Courts Have Assumed Jurisdiction.

The District Courts have assumed jurisdiction solely upon the theory that the mere happening of the collision impressed upon such transports lien liabilities which, although then not enforceable, survived and lived by the vessel, and upon the vessel's commitment to merchant service, became enforceable. (See *The Jeannette Skinner*, 266 Fed. 396.) The correctness of the rule, as related to torts committed by vessels when privately owned and operated, is ad-

mitted. It ought not to apply when, at the time of the disaster, the vessel was an instrument of sovereignty.

Such lien, if it exists, is a *jus in re*. In theory it gives the injured party a proprietary interest in the offending vessel. Manifestly such collisions should not make foreigners co-owners with this Government, of its transports.

The District Courts have assumed that certain *obiter dicta* in *The Siren*, 7 Wall. (74 U. S.) 152, and *Workman* v. *New York City* (179 U. S. 552) support such ruling. *The Siren* is a prize case—the subject matter, forfeiture of a prize. The collision happened while the vessel was being brought into port, prior to her condemnation. Her captors, private persons, had a proprietary interest in the vessel, if condemned. Forfeiture and prize causes stand apart from the present questions of jurisdiction. The distinction observed by Chief Justice Waite in *The Fidelity, supra*, is the sound one:

> *The Siren* was a case of prize, and the question was, whether damages caused by a collision for which she was in fault, while on her way into port for adjudication, should be paid out of the proceeds of her sale on condemnation. No question of public use was involved. There was nothing to take it out of the general rule of the maritime law, except public ownership, and that, all will concede, is not enough. Property does not become a part of the sovereignty because it is owned by the sovereign. To make it so, it must be

devoted to the public use and must be employed in carrying on the operations of the Government. There may be some expressions of the learned justices who wrote the opinions in these cases (*Siren-The Davis*) which, if separated from the facts then under consideration, would indicate that the lien extended to public vessels employed in the public service, as well as to others; but the question was not up for determination, and it is proper, therefore, to confine the actual decision to the cases as they stand.

See *Carr* v. *United States*, 98 U. S. 433, 438.

This court, in *The Siren* case, declined to pass upon the question whether, if the maritime tort had been committed by a ship in possession of a prize crew and had been subsequently restored to owners, such claim then could be asserted by proceedings *in rem* against the vessel.

Workman v. *New York City*, *supra*, was a proceeding *in personam*, not *in rem*. The opinion limits its effect to just the exact facts then before the court. The vessel was a city owned boat.

VII.

The writs of prohibition and mandamus afford appropriate relief.

The propriety of this application is definitely settled.

Judicial Code, sec. 234.
The Lake Monroe, 250 U. S. 246.
United States v. *Peters*, 3 Dallas, 121.

In re Baiz, 135 U. S. 403.

Ex parte Indiana Transportation Co., 244 U. S. 456.

In re Metropolitan Trust Co., 218 U. S. 312.

VIII.

It is respectfully submitted that the motion for a writ of prohibition and/or a writ of mandamus should be granted and that a rule should be entered directing the Honorable J. Whitaker Thompson, judge of the District Court of the United States for the Eastern District of Pennsylvania, and the other judges and officers thereof to show cause why the writ of prohibition and/or the writ of mandamus should not issue as prayed for in said petition.

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Attorney General.
WILLIAM L. FRIERSON,
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J. FRANK STALEY,
HORACE T. ATKINS,
Special Assistants to the Attorney General.

MARCH 25, 1921.

○

Supreme Court of the United States.

October Term, 1951

No. Original.

In the Matter

of

UNITED STATES OF AMERICA, owner of the Steamship *Western Maid*, for a writ of prohibition and/or mandamus, petitioner,

—against—

HONORABLE J. WHITAKER THOMPSON, Judge of District Court of the United States for the Eastern District of Pennsylvania, and the officers of said Court.

BRIEF IN OPPOSITION TO THE PETITION.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1921.

#21 Original.

In the Matter

of

UNITED STATES OF AMERICA, owner of the Steamship Western Maid, for a writ of prohibition and/or mandamus, petitioner,

—against—

HONORABLE J. WHITAKER THOMPSON, Judge of District Court of the United States for the Eastern District of Pennsylvania, and the officers of said Court.

BRIEF IN OPPOSITION TO THE PETITION.

Statement of the Case.

This is a petition by the United States that writs of prohibition and mandamus issue against the Hon. J. Whitaker Thompson, Judge of the United States District Court for the Eastern District of Pennsylvania on the ground that he is proceeding to hear a cause not within his jurisdiction.

The libel in the cause was filed on November 8, 1919, against the steamship Western Maid by the British Tankers Company, Ltd., to recover damages sustained by the British tank steamship British Isles while at

anchor on a lawful anchorage ground off Stapleton, Staten Island, New York Harbor, about 9:35 P. M. January 10th, 1919, as a result of a collision with the Western Maid.

On November 12th, 1919, the United States appeared, by its proctor, the United States Attorney for the Eastern District of Pennsylvania, and filed a claim for the Western Maid, "without admitting the jurisdiction of the said Court in the case, and without submitting the rights of the United States to the said jurisdiction." The vessel at that time was under attachment by the United States marshal (Record, page 29).

On November 20th, 1919, the United States Shipping Board Emergency Fleet Corporation filed a stipulation for value for the release of the vessel, and the stipulation was approved by the Court. The stipulation was signed by the Emergency Fleet Corporation, but not by the United States, the claimant. The stipulation, like the claim, recites that the United States reserves the right to raise the question of jurisdiction, but there is no reservation with respect to the liability of the United States Shipping Board Emergency Fleet Corporation.

No answer has been filed notwithstanding the rules of the Court provide that answers shall be filed within fifteen days, which in this case expired on November 23rd, 1919.

The suggestion of want of jurisdiction was not filed until February 20th, 1920 (Record, page 24, *et seq*), although the Government had stated in its claim that the vessel was owned by and was in the possession of the United States at the time of attachment. The suggestion recites that the Western Maid while in the course of construction at Portland, Oregon, was requisitioned by the United States Shipping Board Emergency Fleet, Corporation, as agent for the President; and that when the vessel was completed, she was registered in the name of the United States at the port of Portland, Oregon (Record, pages 23 and 24).

The Certificate of Registry (Exhibit B, attached to the suggestion), appears at pages 27 and 28 of the Record. It will be observed that the Certificate is an ordinary Certificate of Registry, issued by the Collector of Customs, for a merchant vessel, entitling her to engage in foreign trade. The certificate recites that it is issued in pursuance of Chapter One, Title XLVIII "Regulation of Commerce & Navigation," Revised Statutes of the United States. The description of the vessel in the Certificate is that of an ordinary cargo steamer and, in so far as her legal status as a vessel is concerned, it appears that, after she was registered, she was under the jurisdiction of the Department of Commerce, Bureau of Navigation (Record, page 28).

It is suggested in the brief filed on behalf of the Government that the Western Maid thereafter became an army transport. This assumption apparently rests on the fact that the Western Maid was "allocated" to the War Department. It is to be noted from the suggestion that the so-called "allocation" was "by the United States Shipping Board," and there is nothing in the record which suggests that the vessel was ever commissioned as an army transport, or ever changed her character as described in the Certificate of Registry, or, for that matter, ever passed from the jurisdiction of the Shipping Board. The fact that the ship was "allocated" by the Shipping Board shows that it was careful not to release its jurisdiction over her. Apparently the purpose of the "allocation" was to permit the Shipping Board to designate the service in which the vessel should engage. In passing it may be said that the so-called "allocation" took place on January 10th, 1919. The suggestion is not clear as to the exact hour of allocation, but it appears that it was after 1:00 P. M. on that day (Record, page 24). It appears further that the "allocation by the United States Shipping Board" to the War Department came to an end on March 20th, 1919.

The affidavit of Howard M. Smith, Assistant Secretary of the United States Grain Corporation (Record, page 29), filed by the Government on May 18th, 1920, in support of its suggestion shows that on January 10th, 1919, the Western Maid

> "Had loaded at the port of New York a cargo of flour and packing house products for the relief of the civilian populations of Europe, the said steamship Western Maid being bound for Falmouth, England, for orders."

Hence it appears that the cargo had been loaded on the Western Maid while she was a merchant vessel, the so-called "allocation" having taken place only a few hours before the collision.

The cargo was loaded on the Western Maid pursuant to arrangements made by Mr. Hoover, in accordance with authority received from the President of the United States. This authority was embodied in a document attached as Exhibit A to Mr. Smith's affidavit, and referred to in the record as memorandum received from Mr. Hoover November 16th, 1918. The document is dated November 12th, 1918, and is signed by the President. It is significant that the date is one day after the Armistice (Record, pages 31 and 32).

Mr. Smith, in his affidavit, says that the money to be paid for the cargo of the Western Maid at port of loading was to come out of an appropriation of $100,000,000.00 made by Congress in an Act approved February 14, 1919.* The collision occurred on January 10, 1919, or more than a month before the Act became law. A reference to Mr. Hoover's memorandum shows that the cargo of the Western Maid was to be sold to "populations which are now or have been under the domination of the Central Empires." The Act of February 25, 1919,

*So far as we can ascertain there is no Act dated February 14th. Apparently Mr. Smith had reference to the Act of February 25, 1919.

expressly limited the use of the $100,000,000.00 thereby appropriated so that no part of the fund should be used for the purchase of foodstuffs to be sent to territories then or lately under the domination of the Central Empires.

It definitely appears from Mr. Hoover's memorandum that on delivery of the cargo of the Western Maid to the buyer it was

> "To be paid for by the buyer." (Record, page 32.)

And it further appears from Mr. Hoover's memorandum:

> "That, if it proves infeasible to reship or redirect the steamers to the territories lately held by the Central Empires, Mr. Hoover will make arrangements for the resale of the foodstuffs to the Allied Governments, or alternatively to the Belgian Relief."

None of the documents filed by the Government discloses at what price the food products were to be sold, nor whether the Government made a profit on the transaction. It appears clearly, however, that the Government was engaged in the buying and selling of merchandise, and, beyond the bald statement of the United States Attorney in his suggestion, there is nothing in the record which would warrant the statement that the Western Maid was at any time used as an army transport.

It is stated by Mr. Smith, in his affidavit, that the Grain Corporation had paid no freight, but it is not disclosed whether the goods were sold at the prevailing market price at destination or at a price computed on cost, plus charges, such as cost of carriage, insurance, etc. Moreover, the bill of lading indicated that freight was to be paid.

The mere fact that the vessel was manned by a naval

crew has no significance, because it does not appear that she was at any time commissioned as a Navy vessel or that she performed any service for the Navy Department. (Record, pages 24 and 25.)

The Honorable J. Whitaker Thompson, against whom the Writ of Prohibition is sought, says in his return (page 2) that

> "It was not made to appear to the Court otherwise than as appears from the statements contained in the suggestion of want of jurisdiction, that the steamship Western Maid was employed at the time of the collision in the furtherance of military operations.
>
> * * * * * *
>
> "In the affidavit of Howard M. Smith, and the memorandum of Herbert Hoover, filed by the United States of America, with and as a part of its Suggestion of Want of Jurisdiction herein, it appeared that the steamship Western Maid was employed at the time of the collision, to wit, January 10, 1919, in the carriage of flour and packing house products, purchased by the War Department in co-ordination with the United States Food Administration and intended to be sold to the civil populations of Europe."

The amended and supplemental return of Judge Thompson incorporates copies of the bill of lading and manifest of the Western Maid covering the cargo on board at the time of the collision and shows that the Government submitted these copies in support of its suggestion. The bill of lading acknowledges receipt of the cargo from the Food Administration Grain Corporation, and recites that it is to be carried to destination as ordered on arrival Falmouth, England, and to be delivered there to the Food Administration Grain Corporation, or assigns. The following words are written on the bill of lading:

"Freight as Agreed".

The manifest names the Food Administration Grain Corporation as both consignor and consignee.

It is respectfully submitted that the case presented is not that of a warship or public vessel, duly commissioned as such, coming into collision with a privately owned ship, but a case of a collision between a privately owned ship and a Government owned ship engaged in carrying cargo to be sold as merchandise to enemy aliens, or, failing to find purchasers among enemy aliens, to be sold to friendly aliens.

When the case came on for hearing, Judge Thompson said that

> "It is not open to controversy as it was in *The Jeanette Skinner* (258 Fed. 768), that at the time of the arrest the vessel was employed solely as a merchant vessel within Section 9 of the Shipping Board Act of September 7, 1916."

He then held that (Record, page 36):

> "The Court had jurisdiction *in rem* at the time of the arrest for liability incurred by the collision while the vessel was in the public service of the Government."

This suit was originally instituted under section 9 of the Shipping Board Act of 1916. After the suit was brought, Congress passed the Suits in Admiralty Act, of March 9th, 1920. The Court will note that, by the terms of the Act of 1916, the vessel can only be proceeded against when purchased, chartered or leased from the Shipping Board, whereas the Suits in Admiralty Act permits suits against the United States whenever a Government vessel is employed as a merchant ship. In the present case the Western Maid was admittedly chartered from the Board at the time the suit was

begun, and we think that the facts in this case are broad enough to establish that she was also chartered from the Board at the time of the collision. Irrespective of this consideration, however, the suit could be brought against the United States under the Act of March 9th, 1920. The Western Maid was a merchant ship, not only at the time suit was brought, but also at the time of the collision. The distinction, in this respect, which the Government is attempting to make, is unimportant, but conceding all that the Government says, the present case meets the rigid requirements upon which counsel for the Government insist.

I

The Government concedes that the Western Maid, at the time of her arrest, was subject to suit.

The Government concedes, in the memorandum filed in this Court with its petition for a writ of prohibition, that

> "The question thus presented is not one of immunity from process of the Court, but one of immunity from liability for collision liens." (Government's Memorandum with Petition, p. 47.)

Indeed, under the decision of this court in *The Lake Monroe*, 250 U. S. 256, no other conclusion could have been reached. As was stated by Judge Thompson, it was not open to controversy that the Western Maid, at the time of her arrest, was employed solely as a merchant vessel under section 9 of the Shipping Board Act of September 7th, 1916.

II

The Western Maid was a merchant vessel at the time of the collision.

The Government's suggestion shows that the Western Maid was a carrier of merchandise which was "to be paid for by the buyer" (Record, p. 32). Certainly it cannot be said that the sale of foodstuffs to enemy aliens is a necessary function of the sovereign. Indeed, the action of Congress, in providing that the funds appropriated by it should be limited to the

> "Furnishing of foodstuffs and other urgent supplies, and for the transportation, distribution and administration thereof, to such populations in Europe and countries contiguous thereto outside of Germany, German Austria, Hungary, Bulgaria and Turkey." (Act Feb. 25, 1919, 40 Stats. at L. 1161.)

indicates that Congress was of opinion that it was unwise for the Government to engage in trade with enemy populations. Moreover, it is open to serious doubt whether it is constitutional for this Government to engage in transporting foodstuffs to be offered for sale at destination. By this we do not mean to suggest that the Government could not buy foodstuffs for consumption either by its forces or others engaged in its service, or for the relief of famine stricken districts, but we do urge that, when the foodstuffs are bought for the purpose of resale, there is a serious question whether the officers of the Government can legally engage in such business. A similar doubt was expressed in argument in the case of The American Government Ship Coelleda, VI Lloyds List Law Reports 268, February 14, 1921. As we understand the situation, the officers of the Federal Government had a like doubt, and it was for this reason that a corporation was formed, known

as the Food Administration Grain Corporation, name later changed to the United States Grain Corporation, under the general corporation laws of the State of Delaware. The fact that the Government considered it either necessary or expedient to organize such corporations, indicates that the business in which they were to engage was essentially of a private, rather than of a governmental or sovereign character, and that it was the intention to avoid committing this Government to the theory that such activities were properly governmental or sovereign activities. See Charles G. Fenwick, Political Systems in Transition, page 201.

This Court, in *United States* v. *Strang*, 254 U. S. 491, said that

> "Generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation" (citing authorities).

See also:

> *United States S. B. Emergency Fleet Corp.* v. *Wood*, 274 Fed. 893 (C. C. A. 2nd Circuit, June 15, 1921).

In this connection, we call the Court's attention to the fact that the food products constituting the cargo of the Western Maid were purchased by the War Department through the Food Administration, and also to the fact that the affidavit supporting the Government's suggestion is made by the Assistant Secretary of the United States Grain Corporation, successor to the Food Administration Grain Corporation, rather than by an officer of the Government.

The collision took place two months after the Armistice. We submit that, under such circumstances, the Western Maid, at the time of the collision, could in no

event be called a vessel engaged in a military operation. In any event, the Government has the burden of proof to establish that the Western Maid was a public vessel engaged in a military operation. *Ex parte Muir*, 254 U. S. 552.

The United States attorney submitted to Judge Thompson a copy of the ship's bill of lading, in which the Food Administration Grain Corporation was named as consignor, "destination as ordered on arrival Falmouth, England." (Supplemental Return.) The shipment was made subject to "the charter party or agreement between the War Department of the United States and the United States Shipping Board applicable to this vessel." "Freight as agreed." It thus appears that the Western Maid had all the documents aboard usually carried by a merchant ship, viz., a certificate of registry, a manifest and a bill of lading.

It is submitted, however, that, even if it were a fact that no freight was to be paid for the carriage, this circumstance would not affect the case. Years ago it was a common thing for a merchant to load a vessel and send her abroad with his own goods to be sold. During the war period, and thereafter, this old practice was revived. The mere fact that the ship and goods were owned by the same person did not change the character of the ship from that of a merchant vessel. She was carrying goods which were intended for commerce. So, in this case, although both the Western Maid and her cargo were owned by the Government, it was intended that her cargo was to be sold to the civilian population of Europe. It follows that the Western Maid was a merchant vessel.

In re Jupp, 274 Fed. 494, 495.

In *The Exchange*, 7 Cranch. 116, the United States attorney who appeared on behalf of Napoleon, the Emperor of the French, was careful to bring into court

the original commission of the captain of the ship. The Exchange had been owned by American citizens who, when the ship put into an American port filed a libel for possession. Chief Justice Marshall at page 146 of his opinion said:

> "In the present state of the evidence and proceedings, the Exchange must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact that she is now a national armed vessel, *commissioned by*, and in the service of the Emperor of the French." (Italics ours.)

There is no suggestion that the Western Maid was commissioned. On the contrary the record shows that she was registered as a merchant ship, and, in view of the fact that the certificate of the Collector of Customs at Portland attesting that the copy attached to the sugge tion is a true copy of the original on file in his office, is dated February 24th, 1920, it is to be inferred that at the time of the collision the Western Maid was operating under this Registry, R. S. 4170, 4171 (Navigation Laws of the United States, 1919, p. 41).

III

Congress, by the Act of March 9, 1920, has waived immunity as to merchant vessels. The effect of Section 3 of this Act is to make this cause a suit under that Act.

The United States Shipping Board Emergency Fleet Corporation filed a stipulation for value in this case, but the Attorney General has not as yet filed the suggestion contemplated by Section 3 of the Suits in Admiralty Act. The latter part of Section 3 of that act is as follows:

> "Neither the United States nor such corporation (Shipping Board Emergency Fleet Corpora-

tion) shall be required to give any bond or Admiralty stipulation in any proceeding brought hereunder. Any such bond or stipulation heretofore given in Admiralty cases by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in Section 8 of this Act."

The libellant in this case is entirely willing that the Attorney General shall file his suggestion that the United States is interested in the case.

It is submitted that the Congress left to the Attorney General only the ministerial duty of filing such a suggestion.

Mississippi v. *Johnson*, 4 Wall. 475;
Kendall v. *United States ex rel. Stokes*, 12 Peters, 524;
Lower v. *United States ex rel. Marcy*, 91 U. S. 536;
Roberts v. *United States ex rel. Valentine*, 176 U. S. 221;
United States ex rel. Steinmetz v. *Allen*, 192 U. S. 543.

The effect of Section 3 of this Act is to place litigants, who had proceeded under the Act of 1916 and in whose cases stipulations had been filed by the Emergency Fleet Corporation, in the same position as if the suits had been brought under the Suits in Admiralty Act. The mere fact that the Attorney General has failed to do what the Congress intended that he should have done, does not change the situation. Congress, of course,

has the power to waive the immunity Government's attorneys seek as a shield in this case. We submit, that in so far as the Western Maid is concerned, it has done so. Not only does this appear from the plain language of the statute, but it appears that, when Congress was discussing this statute in Committee, the stipulation which was filed in this case was referred to by Charles F. Dutch, Esq., Admiralty Counsel for the Shipping Board, as one of the obligations of the Emergency Fleet Corporation of which the Fleet Corpoartion would be relieved by the inclusion of Section 3 in that act. (Hearing before the Committee on the Judiciary, Sixty-sixth Congress, First Session, on The Attorney General's substitute for S. 3076 and H. R. 7124, page 47.)

It is submitted for the foregoing reasons that, on the facts of this case, irrespective of the considerations which we shall now proceed to call to the Court's attention, the District Court has jurisdiction.

We have shown that the Western Maid was a merchant ship at the time of the collision and that the Congress, by the act of March 9, 1920, has expressly waived immunity in respect of such ships.

For this reason, if no other, the petition for the writs should be denied.

IV

If, however, we assume that the Western Maid was a public vessel at the time of the collision, nevertheless a claim in favor of the libellant was created against her at that time. Although the claim could not then be enforced, it existed, and, when the vessel became generally subject to suit, could be enforced by suit in rem.

Under the Maritime law, when a vessel negligently collides with another vessel, a claim is created against the vessel at fault in favor of the injured party.

See *The Siren*, 7 Wallace, 152, 155, 156, 158, where this Court said:

> "For the damages occasioned by collision of vessels at sea, a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the Admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case, the claim exists equally as if the vessel belonged to a private citizen, but, for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the Government, incapable of enforcement without its consent and unavailable for any purpose. * * * The inability to enforce the claim against the vessel is not inconsistent with its existence. * * * A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control."

The facts in *The Siren* were as follows:

The steamer Siren was captured by the United States Navy steamer Gladiolus at Charleston while she was attempting to run the blockade of that port. She was placed in charge of a prize master and crew, and ordered to proceed to Boston for adjudication. She put into New York for coal and, while passing through Hellgate, ran into and sank the sloop Harper, laden with iron. This court held that the collision resulted from the fault of the Siren. When the Siren arrived at Boston a libel in prize was filed against her and she was condemned and sold. The proceeds of sale were deposited with the Assistant Treasurer of the United States, subject to the order of the court. The owner of the Harper and the owners of her cargo intervened by a petition and asserted a claim upon the Siren and her proceeds for the damages sustained by them as a result of the collision. The District Court held that the

intervention could not be allowed, and dismissed the petition. On appeal this court held that the intervention was proper, reversed the decree of the District Court, directed that the damages sustained by the petitioners be assessed, and that they be paid out of the proceeds before distribution to the captors. It was subsequently held in *The Siren*, 13 Wallace, 389, that "the capture enured exclusively to the benefit of the United States."

The Government, in its brief, says that the language which we have quoted is a dictum. We are unable to agree with this statement. An examination of the opinions in the *Siren* case discloses that Mr. Justice Nelson dissented on the ground upon which the Government relies in this case. He said:

> "If the owner of the offending vessel is not liable at all for the collision, it follows, as a necessary legal consequence, that there can be no lien, otherwise the non-liability would amount to nothing" (7 Wall. 164).

When the members of this Court, in face of a single dissent, make a doctrine one of the principal grounds for the Court's decision, such a doctrine can hardly be called a dictum.

The Government suggests that, because the Siren was a prize, that case is distinguishable. We submit that this conclusion does not follow. Mr. Lord, in an article published in 19 Columbia Law Review, page 477 (December, 1919), says:

> "The authority of the Siren has never been questioned. We may regard the Siren as a Government ship, since the decision that she was a lawful prize dated back to the time of her capture. She was in the possession of the Government at the time of the collision. If the United States could have had her condemned, without hearing in court, the Siren would have been libel-proof."

Mr. Justice Nelson, in his dissenting opinion (7 Wall. page 163) says:

> "The steamer Siren, having been captured by the United States steamship Gladiolus, a Government vessel of war, *jure belli* became the property of the United States subject only to the right of the claimant to have the question of the legality of the capture determined by the prize court to which it was sent for condemnation. Captures made by Government vessels belong to the Government, and no title exists in the captors except to their distributive shares of the proceeds after condemnation (*Dos Hermanos*, 10 Wheaton, 306; *The Aigburth*, *Blatchford's Prize Cases*, 635; *The Adventure*, 8 Cranch, 226)."

As we view the case, The Siren was a decision directly in point.

The proposition relied upon by Mr. Justice Nelson as a ground for his dissent, viz. that, if an owner of an offending vessel is not liable, as the legal consequence, it follows that there can be no lien, is contrary to the decisions of this Court in *The China*, 7 Wallace, 53, and in many other cases.

Mr. Justice Gray, in *Ralli* v. *Troop*, 157 U. S. 386, 402, says:

> "That decision (referring to *The China*, 7 Wallace, 53) proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo; nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damage" (7 Wallace, 68).

This Court, in numerous other decisions, has time and time again emphasized this principle. *The Black-*

heath, 195 U. S. 361; *Tucker* v. *Alexandroff*, 183 U. S. 424; *The Palmyra*, 12 Wheaton, 1; *The Brig Malek Adhel*, 2 Howard, 219; *The John G. Stevens*, 170 U. S. 122; *The Barnstable*, 181 U. S. 464-467.

Liability *in rem* is entirely independent of liability *in personam*. See *Homer Ramsdell* v. *Compagnie General Transatlantique*, 182 U. S. 416, where it was held that the owner of a vessel which was in charge of a compulsory pilot was not liable personally for a collision, although, as in *The China*, the vessel herself would be so liable; and, in *The Barnstable*, *supra*, page 467, this Court said:

> "Whatever may be the English rule with respect to the liability of a vessel for damages occasioned by the neglect of the charterer, as to which there appears to be some doubt, *The Ticonderoga*, Swabey, 215; *The Lemington*, 2 Asp. Mar. Law Ca. 475; *The Ruby Queen*, Lush. 266; *The Tasmania*, 13 P. D. 110; *The Parlement Belge*, 5 P. D. 197; *The Castlegate* (1893), App. Ca. 38, 52; *The Utopia* (1893), App. Cas. 492, the law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in possession of her whether as owner or charterer. *The Little Charles*, 1 Brock. 347, 354. It was said by this Court in the case of *The Palmyra*, 12 Wheat. 1, 14, referring to a seizure in a revenue case: 'The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this whether the offence be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizure in the admiralty.' So in *United States* v. *Brig Malek Adhel*, 2 How. 210, speaking of a forfeiture incurred by a piratical aggression, Mr. Justice Story remarked (p. 233): 'That the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated

> as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner * * * It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or the personal responsibility of the owner thereof.' This was the principle upon which this Court held, in the case of *The China*, 7 Wall. 53, that a vessel was liable for a collision occasioned by the fault of a compulsory pilot—a marked distinction from the English rule, which, by statute, exempts the vessel from such consequences."

And in *Tucker* v. *Alexandroff*, Mr. Justice Brown, referring to a warship of the Russian Navy, said (at page 424):

> "A ship is born when she is launched and lives so long as her identity is preserved. Prior to her launching, she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject to mechanics' liens created by State law and enforcible in the State Courts. In the baptism of launching, she receives her name, and, from the moment her keel touches the water, she is transferred and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract and is individually liable for her obligations upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents are not her agents and her agents are not her owner's agents (citing cases).
>
> She is capable, too, of committing a tort, and is responsible in damage therefor. She may also become a quasi bankrupt; may be sold for the payment of her debts and thereby receive a complete discharge from all prior liens, with liberty to begin life anew, contract further obligations and perhaps be subjected to a second sale."

The Government has stressed *The Parlement Belge*, L. R. 5 P. D. 179, an English case, as an authority for its position. Because of the difference between the conception of the liability of a ship, under the English Law, and that under the American Law, the English authorities are not in point. This distinction is clearly stated in the authorities which we have just quoted. For this reason, under English Law, property owned by a sovereign, although not in his possession, is immune. Such, however, is not the American Law, *The Davis*, 10 Wall., 15. This is well put by Judge Ward, of the Circuit Court of Appeals for the Second Circuit, in *The Carlo Poma*, 259 Fed., 369, 370, where he said:

> "The English Courts go the whole way in refusing process against property of a foreign sovereign under any circumstances. This because of the international comity due from one sovereign to another. *The Parlement Belge*, Law Reports, 5 P. D., 197; *The Jassy* (1906) P. 270.
>
> "The law of the United States is the same, *except that the immunity of property of a sovereign, depends, not merely upon the ownership, but also upon the actual possession at the time process is served.*"
>
> *The Davis*, 10 Wall. 15, 19 L. Ed. 875;
> *Long* v. *The Tampico*, (D. C.) 16 Fed. 491;
> *The Attualita*, 238 Fed. 909, 152 C. C. A. 43.
> (Italics ours.)

But, even in England, it is settled, as was said by this Court in *Workman* v. *New York City*, 179 U. S. 552, 556, that a collision imprcses a liability on a public vessel which becomes enforcible when the crown waives the immunity of the public vessel from remedy or suit. In the *Workman* case, Mr. Justice White, delivering the opinion of the Court, said (at page 556):

> "As no warrant issues in these cases for the arrest of the vessels of the crown, and no bail is given on the appearance, it is insisted that they

> are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the Government is concerned. This may be the only results of the suits, BUT THEY ARE INSTITUTED AND CONDUCTED ON THE HYPOTHESIS THAT CLAIMS AGAINST THE OFFENDING VESSELS ARE CREATED BY THE COLLISION. *The Clara*, 1 Swabey, 3 and *The Swallow*, 1 Swabey 30." (Capitals ours.)

The Ticonderoga, 1 Swabey Adm. Rep. 215, (Dr. Lushington) and *Fletcher* v. *Braddick*, 2 Bos. & P. (N. R.) 182 (Lord Mansfield), expressly hold that a collision creates a lien or liability against a public vessel or warship. In both these cases the Courts enforced such a lien after the vessel had come into private hands.

In *The Davis*, supra, it was held that personal property of the United States on board a vessel for transportation from one point to another is liable to a lien for salvage services rendered in saving the property. It was there said (10 Wall. 19):

> "There are some expressions in the opinion of this court in the case of *The Siren*, which seem to imply that no suit *in rem* can be instituted against property of the United States under any circumstances. But a critical examination of the case and the reasoning of the court, will show that that question was not involved in the suit, and that it was not intended to assert such a proposition without qualification. In that case a prize, after capture and before condemnation, had collided with another vessel and was in fault, and it was held that as the government had brought the prize into the court for condemnation, and was before the court as plaintiff, and had placed the *res* in possession of the court, the lien for the damages growing out of the collision could be enforced against the United States. It was not, therefore, necessary to define all the circumstances under which the court, having control of the *res*, might en-

force a lien on property of the United States; and the learned judge who delivered the opinion cites with approval the case of *The Light Boats*, in 11 Allen, in which *the doctrine is laid down and well supported that proceedings in rem to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court. With the principle as thus stated we agree, and do not see in it anything inconsistent with the case of The Siren.*" (Italics ours.)

In *Workman* v. *New York City*, 179 U. S. 552, 566, Mr. Justice White, delivering the opinion of this court, discusses at length the law relating to the liability of public vessels. He says:

"We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, the doctrine above stated rests not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress

in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted.

The decisions of this court clearly expound the principles we have stated. *The Exchange* (1812), 7 Cranch, 116, involved the right of a court of admiralty to enforce, by a proceeding *in rem*, an alleged maritime claim against a vessel of war of a foreign nation. The right to relief was denied exclusively because of a want of jurisdiction over the foreign sovereign or his property.

The Siren (1869), 7 Wall. 153, involved the liability of a prize ship in the possession and control of the officers of the United States for an injury inflicted by a collision of the ship with another vessel, averred to have been occasioned by the negligent management of those in charge of the prize ship. In considering the power of the court to adjudicate the controversy, the court said (p. 185):

'For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.'

In England, when the damage is inflicted by a vessel belonging to the crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel *in rem*, upon which the court directs the registrar to write to the Lords of the Admiralty requesting an appearance on behalf of the crown—which is generally given—when the subsequent proceedings to decree are conducted as in other cases. Coote's New Admiralty Practice, 31. In the case of *The Athol*, 1 W. Robinson, 382, the court refused to issue

a monition to the Lords of the Admiralty to appear in a suit for damage by collision, occasioned to a vessel by a ship of the crown; but the lords having subsequently directed an appearance to be entered, the court proceeded with the case, and awarded damages. As no warrant issues in these cases for the arrest of the vessels of the crown, and no bail is given on the appearance, it is insisted that they are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the government is concerned. This may be the only results of the suits, but they are instituted and conducted on the hypothesis that claims against the offending vessels are created by the collision. *The Clara*, 1 Swabey, 3, and *The Swallow*, 1 Swabey, 30. The vessels are not arrested and taken into custody by the marshal, for the reasons of public policy already stated, and for the further reason that it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared.'

As the prize vessel had been condemned and sold at the instance of the United States, and the proceeds were in the registry of the Court for distribution, the court gave the relief sought against the proceeds of the sale, because the facts stated established, not only the liability of the offending ship, but also furnished the basis of jurisdiction.

The same principle was applied in the later case of *The Davis*, (1869) 10 Wall. 15, where it was held that personal property of the United States on board of a vessel for transportation from one point to another was liable to a lien for salvage service rendered in saving the property from a peril of the sea, and that such lien might be enforced by a proceeding *in rem*, when the process of the court might be used without disturbing the possession of the government.

The statement of the maritime law of England on the subject now being considered made in *The Siren*, *supra*, makes it clear that, in harmony with the maritime law of this country, THE FACT THAT A WRONG HAS BEEN COMMITTED

BY A PUBLIC VESSEL OF THE CROWN AFFORDS NO GROUND FOR CONTENDING THAT NO LIABILITY ARISES, BECAUSE OF THE PUBLIC NATURE OF THE VESSEL, although, it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given. This is well illustrated by the cases to which we shall now refer.

The Athol, (1842) 1 Wm. Rob. 374, was the case of a British troopship which had run down a brig in the English Channel. The Lords of the Admiralty having refused a petition for compensation, the owner of the brig applied to the High Court of Admiralty to decree a monition to issue against those officials. In declining to issue the monition, for want of power, Dr. Lushington said (page 382):

'Under the circumstances of this case then, both upon principle and the authority of decided cases, I must decline to issue the monition as prayed. At the same time, sitting here as a judge, in a court of justice, I am bound to express the opinion that I cannot apprehend the high personages who represent Her Majesty in her office of Admiralty, will avoid doing justice, or that, upon a due consideration, they will take upon themselves to say, that they will be themselves the exclusive judges upon the merits of the present case. Whether they shall appear or not, is not a matter for this court to determine. I decline to grant the monition.'

The Lords of the Admiralty subsequently directed that an appearance should be made on behalf of *The Athol*, and as by this act the court had jurisdiction to determine the controversy, it did so, held *The Athol* to have been in fault, and, despite the public nature of the vessel, 'the damages and costs were pronounced for.'

The Parlement Belge, (1879) 4 P. D. 129, was an action instituted on behalf of the owners of a steam tug against the steamship Parlement Belge and her freight to recover damages sustained by the tug in a collision with the steamship. The latter vessel was, at the time of the collision and when the action was instituted, a public vessel of

the Government of the sovereign state of Belgium, navigated and employed by and in the possession of such government, and officered by officers of the royal Belgium navy, holding commissions from His Majesty, the King of Belgium, and in the pay and service of his government. Besides carrying the mails, between Dover and Ostend, the Parlement Belge carried passengers and merchandise, and was employed in earning passage money and freight. Sir Robert Phillimore declared (p. 144) that the case was one of first impression, and to be decided upon general principles and the analogies of law rather than upon any direct precedent, and it was held that the Parlement Belge did not come within the category of a ship of war or a pleasure vessel belonging to the crown of Belgium, and was not exempt from the process of the court. On appeal, however (5 P. D. 197), it was held that the admiralty court was concluded by the declaration of the sovereign authority that the vessel was a public vessel of the state, and, further, that the mere fact of the ship having been used subordinately for trading purposes did not take away the immunity attaching to the public vessel of an independent sovereignty, and that the vessel could not be proceeded against.

It results that, in the maritime law, THE PUBLIC NATURE OF THE SERVICE UPON WHICH A VESSEL IS ENGAGED AT THE TIME OF THE COMMISSION OF A MARITIME TORT AFFORDS NO IMMUNITY FROM LIABILITY IN A COURT OF ADMIRALTY, where the court has jurisdiction. This being so, it follows that as the municipal corporation of the city of New York, unlike a sovereign, was subject to the jurisdiction of the court, the claimed exemption from liability asserted in the case at bar, because of the public nature of the service upon which the fire-boat was engaged—even if such claim for the purposes of the case be conceded—was without foundation in the maritime law, and therefore afforded no reason for denying redress in a court of admiralty for the wrong which the courts below both found to have been committed."

Counsel for the Government say that, as *The Workman* case was an action *in personam*, it is not an authority in the present case, and refer to the fact that the decision was recently considered by this court in *Ex parte Walsh*, Advance opinions, Supreme Court, decided June 1st, 1921, which also was an action *in personam*. In that case this court, speaking through Mr. Justice Pitney, said:

> "Much reliance is placed upon *Workman* v. *New York City*, 179 U. S. 552. That case dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of the defendant; and, in the opinion, the court was careful to distinguish between the immunity from jurisdiction attributable to a sovereign upon the ground of policy, and the immunity from liability in a particular case"

It is just this distinction, so clearly stated by Mr. Justice Pitney, that the Government, throughout its brief, fails to recognize.

The present suit is *in rem*, and as Judge Thompson says, in his opinion, it is conceded by the Government that the court had jurisdiction of the vessel at the time the libel was filed and the arrest made. Consequently the situation presented here is wholly different from that in the *Walsh* case.

The doctrine of The Davis and The Siren has long been familiar to the Federal courts.

> *The Tampico*, 16 Federal 491;
> *Thompson* v. *City of Chicago*, 79 Federal 984;
> *Johnson Lighterage Company No. 24*, 231 Fed. 365;
> *The Attualita*, 238 Federal 909;
> *The Luigi*, 230 Federal 493;
> *The Othello*, 5 Blatch. 343.

The Government relies upon *The Fidelity*, 16 Blatch. 569, Fed. Cases No. 4758, as an authority for its con-

tention. All that the Fidelity decided was that a steam-tug owned by a municipal corporation, and used exclusively for extinguishing fires, was free from arrest.

It is well established that a municipality is only exempt from liability for torts of its officers when performing Governmental functions. This was the principle which Chief Justice Waite undoubtedly had in mind when he held that a fire boat so used in performing a Governmental function was not liable to arrest while being so used. Although he considers the distinction between liability and immunity, he apparently loses sight of the fundamental difference that exists. The only cases cited, in his opinion, are three decisions of New York State Courts:

> *Darlington* v. *Mayor*, 31 N. Y. 164;
> *Brinckerhoff* v. *Board of Education*, 2 Daly 443 (Reported on appeal as *Poillon* v. *Mayor*, 47 N. Y. 666); and
> *Leonard* v. *City of Brooklyn*, 71 N. Y. 498.

All that is held by these cases is that the property of a municipal corporation is not subject to seizure and sale on execution. All these cases rest upon the principle that, to permit a private suitor to attach property being used for a public purpose, would "seriously interfere with and impair the practical workings of the municipal government in the discharge of its legitimate functions" (71 N. Y. 500). These decisions are not inconsistent with the doctrine that a lien, although temporarily unenforcible, exists.

The Fidelity was disapproved in *Thompson* v. *City of Chicago*, 79 Federal, 984, and, so far as its dictum indicated a departure from the doctrine of The Siren and The Davis, was expressly disapproved by this court, speaking through Mr. Justice White, in *Workman* v. *City of New York*, 179 U. S. 552, 565.

In *The Ceylon Maru* (The Jeanette Skinner), 266 Fed. 396 (Dist. Ct. of Md.), a case exactly in point, Judge Rose refused to follow the dictum in The Fidelity. He so carefully analyzes the decision that we quote from his opinion at length.

> "On the 2nd of November, 1918, there was a collision between the American steamship Jeannette Skinner and the Japanese steamship Ceylon Maru. For brevity they will be called the Skinner and the Ceylon. The Skinner was then a Shipping Board ship, and still is. She was in charge of a naval crew, and for some months preceding the day named she had been in government service, engaged in transporting military supplies to the army in France. When she struck the Ceylon, she was homeward bound in ballast. Upon her arrival in this country she went into dry dock, and the Armistice having intervened, she was, on coming out, assigned to carry food products to Europe for account of the Swiss government. While so employed, she was arrested in this case.
>
> For reasons stated in an opinion heretofore filed (*The Jeannette Skinner* (D. C.), 258 Fed. 768), it was held that at the time she was seized by the marshal she was solely employed as a merchant vessel, and that under the authority of *The Lake Monroe*, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962, she was not immune from ordinary process upon a libel *in rem* against her. The question was then reserved as to whether she could be held liable for a collision which occurred while she was owned by the Government and operated by its employes for its public military purposes.
>
> (1) On her behalf it is now argued that no liability *in rem* ever attaches to a ship belonging to the government for anything she does while in its public service. What Chief Justice Waite said, while on the circuit, in *The Fidelity*, 8 Fed. Cas. 1189, No. 4,758, fully sustains this contention. But the Supreme Court in *Workman* v. *New York City*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, explained that what was decided

in that case was merely the application of the exception to the mode of execution of a judgment or decree against a municipal corporation, and then went on to say that in the admiralty law the existence of that exception in all cases had been denied, citing a case from this district. *Oyster Police Steamer of Md.* (D. C., 31 Fed. 763). It expressly declined to pass upon which of the conflicting conclusions on this point was the correct one. *The Siren* was cited (7 Wall. 153, 19 L. Ed. 129), and the English cases analyzed, and it was then declared that the English law, in harmony with the maritime law of this country, held that the fact that the wrong had been committed by a public vessel of the crown afforded no ground for contending that no liability arose because of the public nature of the ship, although it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given. It said that the public nature of the service upon which the vessel was engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, when the court has jurisdiction. In *The Siren*, *supra*, the libel was *in rem*. The language of the Supreme Court is so clear that it does not seem that it is open to two constructions, and such clearly was the opinion of the Judges who sat in *The Florence H.* (D. C.), 248 Fed. 1012; *The Gloria*, 267 Fed. 929; *Samuelson* v. *The F. J. Luckenbach*, 267 Fed. 931 (both of the last mentioned cases having been decided in the Southern District of New York), and *The City of Philadelphia* (D. C.), 263 Fed. 234.

(2) On behalf of the Skinner the further contention is made that, were it not for Section 9 of the Shipping Act of 1916 (Comp. St. §8146e), it would not be possible to enforce any lien against her *in rem* while she remained, as she still is, government property. It is said that the immunity there waived is limited to causes of action which arose while she was employed as a merchant ship. It is argued that the principal reason why the section in question subjected government owned ships, while operated for mercantile

purposes, to the laws, regulations, and liabilities governing merchant vessels, was to protect privately owned craft from unfair competition. That is doubtless true, yet *The Siren, supra*, and *Workman* v. *New York City, supra*, hold that the liability was incurred when the tort was committed, even although the ship was then immune from arrest, and that but for such immunity it was enforceable against her. Now Section 9 expressly subjects government owned ships, when they are operated as merchantmen, to the laws governing merchant ships, and those laws, as interpreted in *The Lake Monroe, supra*, and other cases, include liability to admiralty process, so that, a maritime lien *in rem* existing, and the only objection to its enforcement having been government ownership, and the law having provided that that immunity shall no longer exist when the ship is used as a merchant vessel, it would seem to follow that she must now answer for a tort alleged to have been committed by her while engaged in army service."

* * * * * *

"While it is the duty of the Courts to see to it that the operations of the sovereign shall not be hampered by the seizure of its property, nor shall it, without its consent, be subject directly or indirectly, to suits, there is no reason why such legislation as that found in Section 9 of the Shipping Act of 1916 shall be narrowly construed. Such statutes are remedial, and are entitled to a fair liberality of interpretation."

The following cases are on all fours with the case at bar. Each of them was decided against the Government.

The U. S. S. Hisko, U. S. S. Roanoke and U. S. S. Pocahontas (Circuit Judge Manton, S. D. N. Y.) (March 17, 1921, unreported opinion annexed hereto);

The U. S. S. Newark (District Judge Knox, S. D. N. Y). (March 18, 1921, unreported opinion annexed hereto);

The U. S. S. Sixaola (District Judge Mayer, S. D. N. Y.) (April, 1921, unreported opinion annexed hereto);
The F. J. Luckenbach, 267 Federal, 931;
The Liberty, now before this Court;
The Carolinian, also now before this Court.

See also
The Florence H., 248 Fed. 1012;
The Gloria, 267 Fed. 929;
The City of Philadelphia, 263 Fed. 234.

All of these decisions recognize that *The Siren* and *The Davis* established the principle that a collision creates a lien against a public vessel, which may be enforced by process *in rem* whenever the Government vessel can be seized without ousting the actual possession of the Government. The Federal Judges before whom the question has come have been unanimous in sustaining jurisdiction. The Government has made in each case the same argument that it makes here, but it has been rejected in every instance.

Mr. Justice Story in *United States* v. *Wilder*, 3 Sumner, 308 held that goods owned by the United States were subject to a lien for a contribution in general average. During the course of his opinion, he said (page 312):

> "It is said that in cases where the United States are a party, no remedy by suit lies against them for the contribution, and, hence, the conclusion is deduced that there can be no remedy *in rem*. Now I confess that I should reason altogether from the same premises to the opposite conclusion. *The very circumstance that no suit would lie against the United States in its sovereign capacity would seem to furnish the strongest ground why the remedy in rem should be held to exist*" (italics ours).

The principle that the Maritime law extends to public vessels as well as to private vessels has been expressly recognized by Congress.

The Act of Congress of August 19th, 1890, adopting the International Rules to prevent collisions (Navigation Laws U. S. 1919, p. 355), provides as follows:

> "The following regulations for preventing collisions at sea shall be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith navigable by sea-going vessels."

Section 4233 of the Revised Statutes of the United States provides as follows:

> "The following rules for preventing collisions on the water shall be followed in the navigation of vessels of the Navy and of the Mercantile Marine of the United States."

No distinction between public and private vessels, nor between war vessels and merchant vessels, is made in these rules.

Moreover, where suits have been instituted by the Government for damages sustained by its public vessels from collisions, the liability of the vessels involved, including the public vessels, has been determined in every case by the Maritime law. *The Esparta*, 160 Federal 269; *The A. A. Raven*, 231 Federal, page 380 (C. C. A., 3rd Circuit). In the last mentioned case, the court held both vessels to blame. The case was then referred to a Commissioner to assess the damages, and he assessed the damages to both the A. A. Raven, a privately owned vessel, and the Delaware, the Government vessel. In the final decree on mandate, a balance was struck between the two, and, as the balance was in favor of the privately owned vessel, no recovery was allowed to the United States. It thus appears that the liability was

determined under the principle of *The North Star,* 106 U. S. 17.

Recently a case came before the English court, where a libel was filed by the Lords Commissioners of the Admiralty, representing the British Government as owner of a warship, against a privately owned vessel, to recover damages suffered by the warship from collision. The court, without requiring a petition of right, held the warship solely to blame. *Admiralty* v. *S. S. Eleanor,* VI Lloyd's List Law Reports, 456, March 11th, 1921.

It is to be observed that, when the Government waives its immunity, all that is done is to waive immunity from suit. It cannot be said that the liability arises from the act of the Government in waiving its immunity from suit. The liability existed before the suit was brought, otherwise there could be no cause of action on which to base the suit.

As was said by this Court in *United States* v. *Ringgold,* 8 Peters 162:

> "No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny him the right of setting up such claim in a court of justice, and turn him round to an application to Congress. *If the right of the party is fixed by the existing law,* there can be no necessity for an application to Congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defence to a suit by the United States." (Italics ours.)

Mr. Justice Miller, in *United States* v. *Lee,* 106 U. S. 196, 206, said:

> "As no person in this Government exercises supreme executive power or performs the public

> duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests."

Mr. Lord, in the article to which we have already referred, discusses this matter at length (Columbia Law Review, Volume 19).

When the Suits in Admiralty Act was before the Committee, Ira A. Campbell, Admiralty Counsel for the Shipping Board and the Special Assistant in Admiralty to the Attorney General, said:

> "The Supreme Court has held, I think, in the case of *The Siren*, that while you cannot libel a vessel in the possession of the United States for a maritime lien, nevertheless a maritime lien does arise from a maritime casualty, we will say, while the possession is in the United States, but is unenforcible." (Hearings Senate Committee on Commerce, 66th Congress, 1st Session, on S. 2253, p. 18.)

The Government, in its brief, cites the case of *Kawananakoa* v. *Polybank*, 205 U. S. 349, 353, which was not a suit in Admiralty and in which the facts appear to be wholly different from those in this case. If any expression in that opinion should be regarded as tending against our position, it would not only be in conflict with *The Siren* and *The Davis*, but also with *United States* v. *Ringgold*. Obviously the learned justice who wrote the opinion in that case did not have in mind such a situation as that with which we are now dealing. The fact that none of the decisions just cited was even mentioned in the opinion shows that it was not intended to modify the doctrine which they establish.

Counsel for the Government are unduly perturbed as to the possibility that the decision in this case may impair the archaic notion of sovereignty. Mr. Felix Adler

in his "Ethical Philosophy of Life" (1918) at pages 308-309, discusses the modern views regarding sovereignty. He says:

> "Because of the lack of an ethical point of view, the exercise of force by the state has seemed purely arbitrary and has given rise to a perverted and disastrous conception of sovereignty. The sovereignty of the state has two aspects: The one internal, the other external. Sovereignty means supremacy. The state is sovereign, within limits however, with respect to its citizens. The state is also sovereign, within limits however, with respect to outside states.
>
> With reference to the internal aspect of sovereignty some writers hold that *citizens have no rights as against the state*—only rights accorded by the state. But *this, from the ethical point of view, is a wholly untenable position.* There are rights of the individual, rights of the family, rights of the vocational group which the state does not create but is bound to acknowledge and which its power cannot properly infringe * * *. The absolute conception of sovereignty is the result of the lack of an ethical conception of the social institutions. The state is sovereign only so far as the exercise of its supremacy is necessary to the spiritual end of citizenship * * *. The false notion of state sovereignty as arbitrary and absolute is admittedly today a chief stumbling block in the way of the formation of an international organization of peoples."

And on page 185 it is said:

> "Orthodox jurisprudence like orthodox religion is characterized by the absoluteness of its formula. It ignores the existence of conflicts in the long line of antecedent historical development and it disdains to entertain the demand for modification, though the circumstances of the time loudly call for it * * *. Orthodox jurisprudence effaces the end and treats that which is or has been at one time a means as if it possessed a sanctity of its own."

We annex an opinion recently delivered by Circuit Judge Mack, in *The Pesaro,* which contains an interesting discussion of the modern tendency to restrict a sovereign's immunity. These observations apply with peculiar force to the case which the court has now under consideration. Here a Government vessel rammed and damaged a vessel at anchor. The Government has never suggested that there was a defense on the merits.

Counsel for the Government argue that, if our theory of the law is correct, private ship owners, whose vessels have been damaged, will become part owners of Government vessels at fault. A maritime lien does not entitle the holder thereof to possession or to interfere with the operation of a public vessel. The evil results conjectured by the counsel for the Government are purely imaginary. Whatever inconvenience might have resulted from the arrest of a ship, after being returned to private ownership, is obviated by the Suits in Admiralty Act of March 9th, 1920.

CONCLUSION.

We have shown that:

I. The Government concedes that the Western Maid, at the time of her arrest was subject to suit.

II. The Western Maid was a merchant vessel at the time of the collision.

III. Congress, by the Act of March 9th, 1920, has waived immunity as to merchant vessels, and the effect of Section 3 of this Act is to make this cause a suit under that Act.

IV. If, however, we assume that the Western Maid was a public vessel at the time of the collision, a claim in favor of the libellant was created against her at that

time. Although the claim could not then be enforced, it existed, and, when the vessel became generally subject to suit, could be enforced by suit *in rem*.

It is respectfully submitted that the petition for writs of prohibition and mandamus should be denied.

December, 1921.

T. CATESBY JONES,
Counsel for the Honorable
J. Whitaker Thompson, Respondent.

T. CATESBY JONES,
JAMES W. RYAN,
Of Counsel.

Appendix A.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

STANDARD OIL COMPANY OF NEW JERSEY

—against—

The Steamboat NEWARK, her Engines, etc., Claimant.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING (L. de Grove Potter of Counsel) for libellant;

FRANCIS G. CAFFEY (James W. Ryan of Counsel) for Claimant.

KNOX, D. J.: While it is true that the Newark, at the time of the commission of the tort alleged against her, was in the possession and control of the United States, and manned and officered by the Navy Department, she is not, now that she has been returned to private ownership, immune from liability for the tort of which she is said to be guilty.

A very similar, if not the precise, point here involved was before the Court in *The Gloria*, 267 Fed. 929. Judge Learned Hand there held that a lien might accrue against a ship at a time when she was a part of the United States Navy and solely engaged in the transportation of troops and further, that such lien would survive the transfer of the vessel's possession by the United States. To the same effect in this district is the case of *The F. J. Luckenbach*, 267 Fed. 931, wherein Judge Mack followed the ruling of Judge Hand.

Subsequent to the above mentioned decisions the case of *The Jeanette Skinner,* 266 Fed. 396, came before Judge Rose of the District of Maryland, and he ruled to the same general effect. The judges who sat in the above cases apparently had no doubt that the position assumed by them was supported by *The Siren,* 7 Wall. 152, and so it seems to me. I am not unmindful of what was said by Chief Justice Waite, while on circut, in the *Fidelity,* 8 Fed. Cases 1189, No. 4,758; but the sweeping effect of what was there said was, it would seem, very much limited by the Supreme Court in its decisions in *Workmen* v. *New York City,* 179 U. S. 552.

At all events, two judges sitting in this district have resolved the question adversely to the contention of the Government. That fact standing alone would be quite sufficient to warrant a similar ruling upon my part even if I were inclined to disagree with the conclusions of my colleagues. I believe, however, that *The Gloria* and *The F. J. Luckenbach* were rightly decided and I shall follow them. In addition to the foregoing decisions in this district, I understand that in the case of *Eagle Oil Transport Ltd.* v. *United States of America an Owner of the U. S. S. Pocahontas, et al.,* Judge Manton, sitting in the District Court, handed down on March 16, 1921, a decision in which he holds to this same effect.

Libelant's exceptions to the suggestion of the United States Attorney will be sustained.

March 17, 1921.

JNO. C. KNOX,
U. S. District Judge.

Appendix B.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EAGLE OIL TRANSPORT COMPANY, LTD., as owner of the British SS San Tirso,

—against—

UNITED STATES OF AMERICA, as owner of the U. S. SS Pocahontas.

ADMIRANTE STEAMSHIP CORPORATION, as owner of SS Almirante,

—against—

UNITED STATES OF AMERICA, as owner of SS Hisko.

A. A. WIRE COMPANY, INC., as owner of cargo on board the SS Almirante,

—against—

UNITED STATES OF AMERICA, as owner of SS Hisko.

MARCELINO E. CONLE, trading under the firm name of Marcelino E. Conle & Co., as owner of cargo on board the SS Almirante

—against—

UNITED STATES OF AMERICA, as owner of SS Hisko.

WM. LITZRODT, trading under the firm name and style of Broedermann & Litzrodt, as owner of cargo on board the SS Almirante

—against—

UNITED STATES OF AMERICA, as owner of SS Hisko.

HAIN STEAMSHIP COMPANY, LTD., as owner of the British Steamship Trevanion,

—against—

SS EL DIA (formerly known as U. S. SS Roanoke).

HARRINGTON, BIGHAM & ENGLAR, Proctors for A. A. Wire Co., Inc.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING, Proctors for: Almirante S. S. Corporation, Hain Steamship Co., Ltd., Eagle Oil Transport Corp.

FRANCIS G. CAFFEY, United States Attorney; JAMES W. RYAN, Asst. U. S. Attorney.

In each of the above cases the United States has filed a suggestion. This is a motion whereby it is prayed that the court quash process issued herein and dismiss the libel with costs on the ground that the court is without jurisdiction. The claim is that each vessel is not subject to the jurisdiction of the court because of the rule as to immunity from suit of a sovereign. It is said because the subject matter is not within the jurisdiction of the court, a suit *in rem* cannot be maintained because a maritime lien does not exist against a public vessel. The cause of suit arose while the vessels were in public service and then were immune from process. In well considered cases in the district court since, it has been held that a collision or breach of obligation created a lien, but that the lien was unenforceable while the vessel remained in the Government's possession. That when such a vessel ceased to be in the Government's possession, the lien against it is enforceable and process may be issued. *The Jeannette Skinner*, 266 Fed. 396 (Judge Rose); *The Gloria*, 267 Fed. 931 (Judge Mack). The

immunity which attaches to a public vessel merely prevents the enforcement of the lien which is created in favor of a libellant if his claim be good.

This rule may seem harsh as against a new owner, but the language of Justice Brown in *Tucker* v. *Alexandroff* (183 U. S. 424) is pertinent:

> "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforcible in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. * * * She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a quasi bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale" (p. 438).

The new owner must take the vessel subject to whatever lien exists against her and he must therefore make inquiry as to the past of the ship and the liens thereon.

The objections to the jurisdiction of the court are overruled.

(Signed) MANTON,
U. S. C. J.

March 16, 1921.

Appendix C.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOSEPH CARUBA, as owner, etc.,

Libellant,

—against—

STEAMSHIP SIXAOLA.

(Note: This was a libel against a privately-owned vessel which at the time the liability sued on arose was an Army cargo transport, manned by a Naval crew, and loaded with Quartermaster's and Engineer Corps' supplies destined for the American Expeditionary Forces.)

MEMORANDUM.

The question of jurisdiction here involved has been the subject matter of consideration by this court and has been decided adversely to the contention of the Government.

The F. J. Luckenbach, 267 F. R. 931, per Mack, C. J., sitting in this District;
The Standard Oil Company of New Jersey v. *The Steamboat Newark*, decided March 17, 1921, per Knox, D. J.

See also

The Ceylon Maru, The Jeenette Skinner, 266 F. R. 396.

It is the settled practice in this District that the decision of a brother judge will be followed, unless, perhaps, there is some unusual circumstance or some fact or authority has not been called to his attention or unless the decision seems to be clearly erroneous.

The question here under consideration is arguable, but I agree with the principles laid down in the decisions of Judges Mack, Knox and Rose.

The next question is whether the sinking of the Sixaola which caused her to block the slip and to restrict the movements of vessels caught in the slip, if caused by negligence in her operation was a maritime tort and imposed a maritime lien upon the S. S. Sixaola for all damages caused to the owners of the vessels confined in the slip. I have examined the authorities submitted and carefully briefed by the proctors for both sides, and it seems to me that the position taken by libellant is sound. I am of opinion that it is not material whether or not there has been an actual collision. The question is by no means free from doubt and, if I am in error, the point will be preserved upon appeal, should libellant succeed in obtaining a decree.

April 21, 1921.

J. M. MAYER,
District Judge.

Appendix D.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

LUZZATO & SONS,

Libellant.

—against—

S. S. "PESARO."

BERIZZI BROTHERS COMPANY,

Libellant,

—against—

S. S. "PESARO."

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for Special Claimant.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellants.

MEMORANDUM OPINION.

MACK, *Circuit Judge*:

Libel *in rem* against the steamship *Pesaro* to enforce a claim for damage to a cargo of olive oil shipped thereon. Previously, when the ship was libelled to enforce the same claim, upon the direct suggestion by the Italian Ambassador that the ship was owned by the Italian Government and at the time of the arrest was in its possession and therefore was not subject to arrest, this Court vacated the arrest. Upon appeal, the Supreme Court upheld the libellant's objection that this suggestion must come through the official channels of the United States. The Court added that it had no occasion at that time to consider what the decree should

have been if the matters affirmed in the suggestion had been brought to the Court's attention and established in an appropriate way. *The Pesaro*, 255 U. S. , decided February 28, 1921.

By stipulation, the parties have agreed that the question of jurisdiction shall be decided upon the basis of the following facts: First: That the steamship *Pesaro* was owned by the Kingdom of Italy, registered in the name of Ministry for Railway and Maritime Transportation, a department of the Royal Italian Government charged with affairs of maritime and rail transportation, which has as its head a member of the Italian Cabinet. Second: That the steamship was in the possession of the Italian Government, being manned by a Master, officers and crew employed by and under the direction of the Ministry for Railway and Maritime Transportation and paid by it. Such master, officers and crew were civilians not under the orders of or connected with the Italian naval or military forces, and the vessel was not carried on the roster of the Italian Navy as a naval vessel. Third: That the steamship *Pesaro* was engaged in commercial trade carrying passengers and goods for hire, and in such trade was not functioning in a naval or military capacity, or under the immediate direction of the Department of the Italian Government having to do with naval and military affairs. Fourth: That the letter (the substance of which, so far as necessary, is given in a note below, *a*) of Advocatto Francisco Montefredini, dated June 21, 1920, may be read by either party on the trial of the issues raised by the libel and

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a "1. Question. Is a ship owned by the United States and operated for the United States as a merchant vessel by a private steamship company immune from arrest in the Italian Courts on a claim for damage to cargo or any other claim to which a private ship is ordinarily subject to arrest in the Italian Courts?

Answer. No. Such steamers, notwithstanding they may be owned by the U. S. Government are considered in Italy just the same as a privately owned merchant vessel, and are, therefore, subject to arrest, but always on the authority of the President of the Tribunal.

* * * * * * * * * * *

The U. S. S. B. steamers are subject to arrest, as above, only because they are merchant vessels, as according to the Italian law

the special claim and plea in abatement as the evidence of Francisco Montefredini with the same force and effect as if he had testified in accordance with the said letter; subject, however, to objection by either party to the case as to the materiality, relevancy or competency of the matters referred to in the said letter, or any of them.

The Supreme Court has recently intimated that it considered the question whether the ship of a foreign government used and operated by it as a merchant vessel, is, when within the waters of the United States, immune from arrest in admiralty, as "important and also new" and that the "proper solution is not plain but debatable." *In re Hussein Lufti Bey*, decided June 6, 1921. *In Re Muir*, 255 U. S. , decided January 17, 1921. For that reason a re-examination of this question would seem to be justified, if not required, notwithstanding the decision in this Court in *The Maipo*, 252 Fed., 627; 259 Fed., 367, and the views expressed by the Circuit Court of Appeals in the *Carlo Poma*, 259 Fed., 369, especially as the decree in the latter case was vacated by the Supreme Court for want of jurisdiction in the Court of Appeals, decided February 28, 1921.

The general principle of the immunity of a sovereign state from suit without its express consent is too deeply imbedded in our law to be uprooted by judicial decision. See *Ex parte, In the Matter of the State of New York, Edward S. Walsh, Superintendent*, U. S. Sup. Ct., June

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there is no difference between a vessel owned by a foreign Government or by a private company, provided it is engaged in commercial operations. Only men of war are immune from arrest for claims.

* * * * * * * * * * *

4. Question. Is the ship owned by the Italian Government operated as a merchant vessel by the Italian Government free from arrest in ordinary, judicial process in the Italian Courts?

Answer. During the war all Italian steamers were requisitioned, but notwithstanding were subject to arrest.

This was simply a legal point, and the steamer was immediately released as the Government guaranteed any possible sentence, withholding from the charter money until settlement of case a sufficient amount to cover any claim.

Now this procedure will be discontinued and all merchant vessels, whether Government-owned or privately owned, will be subject to arrest."

1, 1921. While the principle has been fervently defended by some jurists as vital and fundamental to sovereignty (see dissenting opinion of Justice Gray in *U. S.* v *Lee*, 106 U. S., 196), the extent to which it has been carried or retained in modern law has been the subject of strong criticism (*Story, J.* in *U. S.* v. *Wilder*, 3 Sumner, 308; *Laski, The Responsibility of the State in England*, 32 Harvard Law Review, 447; *Maguire, State Liability for Tort*, 30 Harvard Law Review, 20; cf. *Lord, Admiralty Claims Against the Government*, 19 Col. L. R., 467; *Weston, Actions Against the Property of Sovereigns*, 32 Harvard Law Review, 266), and there is observable a tendency to restrict its application or to guard against its *extension* (*U. S.* v. *Lee, supra; cf. South Carolina* v. *U. S.*, 199 U. S., 437).

Where the application of the doctrine is not clear, a solution is not to be found by reference to strict Austinian theory which assumes, by mere definition, that the sovereign is not subject to his own laws. Nor is it to be found by uncritical reference to historical origins. The reasons which in the past led to the exemption of the sovereign from suit may or may not justify the extension of the principle in modern law. In dealing with admiralty causes, historical or theoretical conceptions peculiar to the common law, must not be assumed to be a part of the maritime law of nations.

In attempting to solve a confessedly new and unsettled problem, the Court, while conforming its decision to certain norms or standards evolved from within the legal system, should not determine the application of these standards solely by logic. It may have to choose between competing judicial analogies and parallel trends of juristic thought; its conclusions should, if possible, conform to the practical ends of the law in a moving, working world.

So in dealing with an unsettled problem in the application of sovereign immunity, the Court must not only consider history and logic; it must also look behind and

beyond both and inquire whether the public interests justify or require an extension of sovereign exemption from the usual processes of judicial justice. With the growth and development of state activity, it behooves the Court to consider the consequences which would flow from a ruling removing from the ordinary judicial administration matters of vital importance to the community, which have for centuries been handled through the regular judicial processes.

The question of the exemption from attachment of a ship of a friendly sovereign first arose in our Courts in the case of *The Exchange,* 7 Cranch., 117. It concerned a public foreign ship of war. Bynkershoek had stirred the question whether any ship was immune from seizure, having laid it down as a general proposition that the property of a foreign sovereign was not exempt from attachment (*De Foro Legatorum,* Ch. IV.). Marshall, C. J., pointed out that "the jurisdiction of the nation within its own territory was necessarily exclusive and absolute and susceptible of no limitation not imposed by itself. * * * All exceptions to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. * * * This consent may, in some instances, be tested by common usage and by common opinion growing out of that usage. * * * One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him." Marshall consequently concluded as a principle of public law that ships of war entering the port of a friendly power, open to their reception, are to be considered by the consent of that power as exempt from its jurisdiction.

While the Court had no occasion to consider the case of a public ship used for trading purposes, Marshall (p. 145), pointed out "a manifest distinction between the private property of the person who happens to be a prince and the military force which supports the sovereign power and maintains the dignity and independence of a nation. A prince by acquiring private property in a foreign country may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern."

While Marshall was probably referring to the private property of a prince as a private person, it is interesting to note the similarity of his language to that employed by him in the case of a state engaging in a commercial undertaking. In the Bank of *U. S.* v. *Planters' Bank of Georgia*, 9 Wheaton, 904, he said: "It is, we think, a sound principle that when a government becomes a partne rin any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates and to the business which is to be transacted." *b.* See also *Bank of Kentucky* v. *Wister*, 2 Peter, 318; *Briscoe* v. *Bank of Kentucky*, 11 Peter, 256, 323; *Louisville R. R.* v. *Letson*, 2 How. 497, 550; *Curran*

b Compare the remarks of Lord Stowell in The Swift, 1 Dodo, 320, 339: "The utmost that I can venture to admit is that, if the King traded, as some sovereigns do, he might fall within the operation of these statutes. Some sovereigns have a monopoly of certain commodities, in which they traffick; and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated. But the present question is—is this distribution of the public stores for the public use, a trading within the view of the statute. Looking to authority, as well as principle, and to the public convenience, I conceive, it is not."

v. *Ark*, 15 How., 304, 308; *Panama R. R.* v. *Curran*, 256 Fed., 772; *Lord & Burnham* v. *U. S. S. B., E. F. C.*, 265 Fed., 955, 957.

In *U. S.* v. *Wilder*, 3 Sumner, 308, 315-317, Mr. Justice Story apparently was of the opinion that a government-owned merchant vessel might not be entitled to the same privileges and immunities as a ship of war. He said:

> "A distinction was taken in that case (The Prins Frederik, 2 Dod., R. 451), which, indeed, has been often taken by writers on public law, as to the exemption of certain things from all private claims; as, for example, things devoted to sacred, religious and public purposes; things *extra commercium et quorum non est commercium*. That distinction might well apply to property like public ships of war, held by the sovereign *jure coronæ*, and not to be applicable to common property of the sovereign of a commercial character or engaged in the common business of commerce.
> * * *
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> In the case of *The Schooner Exchange* (7 Cranch, R. 116), it was considered by the Court that the ground of exemption of the ships of war of a foreign sovereign coming into our ports, from all process, was founded upon the implied assent of our government. But it was not decided that the other property of a foreign sovereign, not belonging to his military or navy establishment, was entitled to a similar exemption. Bynkershoek seems, indeed, in his bold and uncompromising manner to have held all the property of a foreign sovereign, including his ships of war, to be liable, in the courts of another sovereign, where they are found, to be attached for his debts. His own government, in a case of that sort, released the property. Bynkershoek has the support of other jurists in favor of his opinion at least to the extent of their common private property, found in the foreign territory. But it is not necessary to consider this point further, as there may be a clear

distinction between the case of a foreign sovereign and that of a domestic sovereign in this particular.

It has been laid down by Vattel (B. 2, S. 213) that the promises, the conventions, and all the private obligations of the sovereign, are naturally subject to the same rules, as those of private persons. And this, as a general rule, has been adopted in the interpretation of contracts, to which our government is a party, by the Supreme Court of the U. S., in the case of *U. S.* v. *Barker*, 12 Wheaton R. 559. Vattel has added in the same place: 'If there exists any difficulty on this account, it it equally conformable to prudence, to the delicacy of sentiment which ought to be conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. This is the practice of the states that are civilized and governed by laws.' (Vattel, B. 2, S. 213.) I fear that this republic cannot justly claim the praise of carrying into effect this deep and solid principle of justice; and the several states of the Union, with very few exceptions, have insisted on the same immunity. But I do not rely upon the language of Vattel to show that it is the duty of the sovereign to fulfil all his obligations, whether founded in contract or implied by the general principles of law; and that sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of courts of justice."

U. S. v. *Wilder*, it is true, is not a direct authority for the proposition here in question. The decision in that case was simply to the effect that government-owned cargoes not in the possession of the government could be withheld by virtue of a maritime lien arising from the obligation of the cargo to contribute in general average. In *The Davis*, 10 Wall, 15, the Supreme Court went a step further and held that such cargoes could not only be retained without judicial process by the ship owner but could be libeled in admiralty by salvors seeking to enforce their lien against ship and cargo. See to the same effect *Johnson Lighterage Co.*, 231 Fed., 365.

But cf. *The Fidelity*, 16 Blatchf., 569; 8 Fed. Cases, 4758. Similarly, in *Long* v. *Tampico*, 16 Fed. 491, revenue cutters belonging to the Mexican Government but not yet delivered into her possession were held subject to libel for salvage services. On the same principle, a requisitioned vessel manned and operated for the Italian Government by her owners was held subject to attachment in *The Attualita*, 238 Fed., 909.

On the other hand, in *Briggs* v. *The Light Boats*, 11 Allen, 157, in an able and exhaustive opinion which has frequently been referred to by the Supreme Court, Judge Gray held that immunity of public ships was not restricted to ships of war; that "the exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character"; that, in consequence, lightships belonging to and in the possession of the United States could not be attached to secure the enforcement of a mechanic's lien. It should be remembered, however, that the case did not arise in admiralty and the actual decision does not go beyond that of the Supreme Court in *Ex parte. In the Matter of the State of New York, et al., owners of the steam tug Queen City*, decided June 1, 1921, in which the question of the immunity of a public trading vessel from a libel *in rem* was expressly reserved. In *Mason* v. *Intercolonial Railway*, 197 Mass., 349, the Massachusetts Court, relying upon *Briggs* v. *The Light Boats, supra*, held that funds belonging to the Canadian State Railway were not subject to attachment under state law by trustee process.

The English courts grant exemption to a merchant vessel owned and operated by a sovereign state even in admiralty. Sir Robert Phillimore, in the *Charkieh*, L. R. 4, A. and E., 59, and in the *Parlement Belge*, 4 Probate Div., 129, after a careful examination of the authorities and a comparison of the civil law on the subject, came to the conclusion that the exemption of a

public ship from seizure did not extend to a vessel engaged in commerce, whose owner was (to use the expression of Bynkershoek) *strenue mercatorem agens.* But, in the latter case, on appeal (5 Prob. Div., 197), Sir Robert's opinion was not sustained. The Court of Appeals found that the carrying of passengers and merchandise had been subordinated to the duty of carrying the mails and that the mere fact that the *Parlement Belge* had been subordinately and partially used for trading purposes did not take away its general immunity, even if an action *in rem* were deemed to be a proceeding solely against the property, and not a procedure directly or indirectly impleading the owner of the property to answer the judgment of the Court. It was careful, however, to point out that in its opinion the owner was indirectly impleaded. Taking this dictum as a starting point, the English admiralty courts by successive decisions have come to recognize that all government-owned ships, whether used for military, political or commercial purposes, are in time of peace, as well as of war, immune from seizure. *Young* v. *Scotia,* 1903 A. C., 501 (Ferryboat used as part of Canadian state railways); *The Jassy,* 1906 Prob. Div., 270 (Merchant vessel used as part of Roumanian state railways); *The Broadmayne,* 1916 Prob. Div., 64 (requisitioned vessel operated in government service by private owner); *The Gagara,* 1919 Prob. Div., 96; *Porto Alexandre,* 1920 Prob. Div., 30 (Merchant vessels owned and operated by friendly sovereign states).

The basis of these decisions is almost exclusively the authority of the *Parlement Belge, supra.* In *Porto Alexandre,* the great difficulties involved in granting an immunity so extensive were pressed upon the Court; but it felt bound by authority. Lord Justice Scrutton expressed the view that these practical difficulties must "be dealt with by negotiations between governments and not by governments exercising their power to interfere with the property of other states contrary to the prin-

ciples of international courtesy which govern the relations between independent sovereign states."

The question, however, is whether international courtesy does or does not require this immunity to friendly foreign states, particularly if the immunity does not exist in favor of the sovereign's own similar interests in his own courts. Certainly there appears to be no consensus of opinion among international jurists to this effect. See *Wheaton International Law*, edited by Coleman Philipson (1916), p. 161; also 12 *Revue Generale de Droit International Public* (1905), p. 143. While the French Court of Appeal at Rennes held a merchantman owned by the British Government carrying wheat and wool for the Allied Governments immune from seizure, it took occasion to point out that the vessel was being utilized "with an object of political interest for the need of national defense, apart from all idea of gain and speculation." More recent decisions of inferior French tribunals, following the English precedents in declining jurisdiction over public vessels employed in commercial service, have been adversely criticised. *Journal de la Marine Merchande*, February 3, 1921.

From the evidence before me it would appear that the Italian Courts refuse to grant immunity in such cases. In Section 9 of the Shipping Act, Congress expressly declared that vessels purchased from the Shipping Board, while employed solely as merchant vessels, shall be subzject to the laws, regulations and liabilities governing merchant vessels; and even during the war emergency, this section was broadly construed by the Supreme Court. *The Lake Monroe*, 250 U. S., 246. Since then, the method of enforcing the liability of our public merchant vessels has been changed by the Suits in Admiralty Act so that the ships cannot and need not be arrested or detained, but the nature of their liability remains unchanged and is unenforceable in the courts. Certainly then the exercise of jurisdiction by the courts in the case of public merchantmen cannot today be con-

sidered novel or revolutionary. The executive branch of our government, it may be assumed, will not be slow to bring to the attention of the judiciary any appropriate suggestion any matter of international courtesy or concern. The failure of our State Department to take any action in these cases is not without significance, c (*Hearings before Committee on Judiciary in H. R. 7124, Suits in Admiralty Act*, 66th Congress, 1st Session, August 26, 1919, p. 38), although I do not mean to say that immunity should be refused in a clear case simply because the executive branch had failed to act.

The English decisions above mentioned seem to proceed on the principle that a ship cannot be libelled *in rem* where the owner cannot under the common law be impleaded *in personam*. This doctrine, so far as effective, would appear to be peculiar to English admiralty and is not accepted as a part of the maritime law in this and other countries. As Justice Gray stated in *Homer Ramsdell Co.* v. *Com. Gen. Trans.*, 182 U. S., 406, 413, a case involving the liability of a ship for the negligence of a compulsory pilot: "There is no occasion to refer further to the English cases in admiralty, because in England, it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in this respect from our own decisions. *The China*, 7 Wall, 53; *Ralli* v. *Troop* (1894), 157 U. S., 386, 402, 420; *The John G. Stevens* (1898), 170 U. S., 113, 120-122; *The Barnstable* (1901), 181 U. S., 464." See *The Maria*, 1 W. Rob, 95, 106, *The Halley*, L. R. 2 P. C., 193, 201. Lord Sto-

c In answer to my inquiry, the Secretary of State, through the Solicitor for the State Department, stated on August 2, 1921:

"It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character. In cases of private litigation in American ports involving merchant vessels owned by foreign governments, the Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this Government in such litigation."

well, in *Neptune II*, 1 Dod. 467, had earlier laid down the rule as to the ship's responsibility for the acts of its pilots in accordance with the general maritime law. And it is perhaps no mere accident that Sir Robert Phillimore, whose views on the maritime law were rejected by the common law judges sitting in the Court of Appeals in the case of the *Parlement Belge, supra*, happened to differ from the Privy Council in the case of *The Halley*, L. R. 2 Ad. & Ec. 3.

It is also important to note that in the *Siren*, 7 Wall, 152, the Supreme Court recognized that a ship in the possession of the government might be held to respond in damages for the negligence of its officers resulting in a collision where the government brought the ship into court to be adjudicated as a prize. It would seem that even the English Courts have gone so far as to apply the doctrine of *respondent superior* to a public ship in admiralty where the government consents to the suit. *The Athol*, 1 W. Rob., 374, 382. The procedural bar removed, it would appear that even a tort liability may in some instances at least be imposed upon a ship owned and operated by the government, notwithstanding the fact that the government could not, on common law principles, be impleaded in the court of claims on the basis of such a complaint (cf. also *Workman* v. *N. Y.*, 179 U. S. 570). In this connection, the words of Judge Story in *U. S.* v. *Wilder*, 3 Sumner, 308, 312, are important: "It is said that in cases where the United States are a party, no remedy by suit lies against them for contribution; and hence the conclusion is deduced that there can be no remedy *in rem*. Now, I confess, that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States, in its sovereign capacity, would seem to furnish the strongest ground, why the remedy *in rem* should be held to exist."

Whatever may be the common law or the civil law on the subject, and it is not necessary to go into that

question here, it should be remembered that the responsibility of a ship in admiralty is not derived from either. It had its sources, as has been frequently pointed out, in the commercial usages and jurisprudence of the middle ages, and earlier. Originally, the primary liability was upon the vessel; that of the owner was not personal but incidental to her ownership; from this, he was discharged either by the loss of the vessel or by abandoning her to creditors. *The China*, 7 Wall, 53, 68; *The Barnstable*, 181 U. S., 464, 467. If, as I believe, sound principles of admiralty jurisprudence require that a ship be treated as an entity separate and distinct from her owner, the immunity of a public ship should depend primarily not upon her ownership but upon the nature of the service in which she is engaged and the purpose for which she is employed. That is a distinction or standard towards which Bynkershoek, Marshall and Stowell tended and in favor of which there is not only the specific authority of Story and Phillimore but the force of judicial analogy and the requirements of modern economic life.

If the *Pesaro* is not immune from seizure by reason of her government ownership, it would seem clear that she could not claim exemption from attachment on account of the merchant service in which she was engaged. While in *The Davis*, 10 Wall. 15; *Long* v. *Tampico*, 16 Fed., 491, and *The Attualita*, 238 Fed., 909, the lack of possession by the government was stressed as of vital importance, in my judgment, such possession is not the exclusive criterion. Since, apart from the question of possible immunity by reason of government ownership, it is generally recognized that without treaty provisions, merchant ships are not exempt from seizure by reason of their employment in the postal service (*Bonfils, Manuel de droit International*, 7th Ed., 1914, Sec. 629), immunity should not be given vessels owned and employed by the government in ordinary times in the usual channels of trade. To deprive parties injured in the

ordinary course of tarde of their common and well established legal remedies would not only work great hardship on them, but in the long run it would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships, and salvors would run few risks to save the property of friendly sovereigns, if they were denied recourse to our own courts and left to prosecute their claims in foreign tribunals in distant lands. See *Hearings before Committee on Judiciary on H. R.* 7124 (Suits in Admiralty Act), 66th Congress, 1st Session, August 26, 1919, pp. 32 and 45. The attachment of public trading vessels, in my judgment, is not incompatible with the public interests of any nation or with the respect and deference due a foreign power.

In many phases of our law today it becomes necessary to distinguish between those cases in which it is, and those cases in which it is not, consistent with the public needs and interests to subject the state, its agencies and properties to the ordinary processes of the law. True it is that in certain cases, involving historic functions of the state, the law is too well settled to admit of doubt or of any nice balancing of interests to determine whether or not judicial processes may be evoked. But where the law cannot be said to be plainly settled, it becomes the duty of the court to determine whether or not the public needs militate against the enforcement through the appropriate judicial channels of the ordinary rules of justice.

The question is not merely whether the function in issue is governmental or private; it is doubtful whether any activity of the state may properly be called private. The public service functions of the state today may be as important in their bearing and as public in their character as the more limited functions to which it was the custom of the state to confine itself a century ago. In developing this field of law, expressions used by the courts have often been inept and inaccurate; the dis-

tinctions drawn in specific cases specious and negligible. Yet a sound principle, though at times, perhaps dimly discerned and mistakenly applied, underlies the cases. The principle is developing in the field of municipal corporations. *City of Los Angeles* v. *Los Angeles Gas Corporation*, 251 U. S. 32. The principle also finds application in the delimitation of the sphere in which the instrumentalities of a state are immune under our constitution from federal taxation. *South Carolina* v. *U. S.*, 199 U. S. 437. While these cases involve the question of substantive liability rather than procedural immunity, the analogy is none the less pertinent; in my opinion, a government ship should not be immune from seizure as such, but only by reason of the nature of the service in which she is engaged.

And as the *Pesaro* was employed as an ordinary merchant vessel for commercial purposes at a time when no emergency existed or was declared, she should not be immune from arrest in admiralty, especially as no exemption has been claimed for her, by reason of her sovereign or political character, through the official channels of the United States.

But if I err in believing that the accepted law of this country does not require a holding that merchant vessels owned and operated as such by a foreign sovereign state are, therefore, exempt from seizure, the *Pesaro* would, nevertheless, not be entitled to immunity.

I do not base this upon the fact that ships owned and operated for commercial purposes by the United States would not be exempt from ordinary process under Italian law, for retaliation and reprisal are for the executive branches of our government and not for the courts. *The Nereide*, 9 Cranch, 388, 442; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589; *Beale I Conflicts of Law*, Part I, p. 103. The doctrine of reciprocity in *Hilton* v. *Guyot*, 159 U. S. 113, should not be extended to a case involving the very jurisdiction of the court.

But the fact that the steamship *Pesaro* itself is sub-

ject to the ordinary processes of the Italian Court would seem to be vital and decisive. There is no reason of international comity or courtesy which requires that Italian property not deemed *extra commercium* in Italy, should be treated as *res publica* and *extra commercium* in the United States. In *Bank of U. S.* v. *Planters' Bank of Georgia,* 7 *Wheaton,* 904, Chief Justice Marshall said: "The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of sovereign character, so far as respects the transactions of the bank and waives all privileges of that character. * * * We think that the Planters' Bank of Georgia is not exempted from being sued in the Federal Courts, by the circumstance that the state is an incorporator." So it may be said here that the Italian Government, by giving to the *Pesaro* the capacity to be sued in the Italian Courts, voluntarily strips the *Pesaro* of its sovereign character and waives all privileges of that character; and that therefore the *Pesaro* is not exempt from suit in the United States, by reason of its governmental ownership and operation. For if a libel can be maintained against the steamship *Pesaro* in the Courts of Italy, it is difficult to see why our tribunals should decline jurisdiction: there is less reason therefor in a case of this sort than in *The Belgenland,* 114 U. S. 355.

October 1, 1921.

JULIAN W. MACK,
U. S. C. J.